Routledge Research in Human Rights Law

HUMAN RIGHTS, CONSTITUTIONAL LAW AND BELONGING

THE RIGHT TO EQUAL BELONGING IN A DEMOCRATIC SOCIETY

Elena Drymiotou

ROUTLEDGE

Human Rights, Constitutional Law and Belonging

While every constitution includes a provision over the right to equal protection of the laws, perhaps with different terminology, this book interprets this right in a new way. Theories of the right to equal protection of the laws as the right to anti-subordination are the most influential theories suggested. However, they are not the same. Elena Drymiotou suggests understanding the right to equal protection of the laws in terms of belonging. She goes on to identify certain criteria and she offers a general theory of the Right to Democratic Belonging. This book uses political theory, constitutional provisions and case law to suggest this new theory of the right to equal protection of the laws; the theory of the Right to Equal Belonging in a Democratic Society or in other words, the Right to Democratic Belonging.

Human Rights and Equal Belonging in a Democratic Society is the starting point of a more comprehensive theory of the right to democratic belonging. It will be of interest both to students at an advanced level, academics and reflective practitioners. It addresses the topics with regard to human rights and equality and will be of interest to researchers, academics, policymakers and students in the fields of human rights law, constitutional law and legal theory.

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The Right to Equal Belonging in a Democratic Society

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Foreword

One can very reasonably ask why a lawyer from Cyprus and educated in Europe, is examining the jurisprudence of the right to equal protection under law in North America? What is my purpose? I have been driven to this intellectual and emotional journey embedded in this study with an awareness that to be equal in a democratic society is the core of citizenship and respectable public life.

My legal studies began as a law student in Greece. During my intellectual and emotional journey, this book offered, with generosity, questions I had already posed to myself in Greece about the place of the Muslim Greeks in Thrace within the larger society in Greece. I also have memories and observations of my first visit in Thrace and my first contact with Muslim Greeks in 2012. I went to KESPEM[1] and had the opportunity to travel with the mobile KESPEM to Mikrohori (directly translated as "Little-Village"), forty-five minutes outside the city of Xanthi. Excited children were waiting for us. The mobile KESPEM was an opportunity for them to travel through the magic world of books with the guidance of the instructor. I was introduced as a young writer who lacked ideas and I was asking them for inspiration. They certainly provided inspiration with their generosity, smiles and enthusiasm to learn.

I had another demanding question to answer, which relates to my home country. In the tiny country of Cyprus, which has been divided since the illegal Turkish invasion and occupation in 1974, efforts for reunification have not yet been fruitful. I am dreaming of living in a reunified democratic society in Cyprus. And then, I have been wondering, "How do we build laws so as to ensure that every Cypriot has an equal belonging in their country?"

The above illustrates the reasons why I started the journey of my Ph.D. I learned more than I initially thought that this journey could offer. I met many people who helped me in this overseas journey in intellectual, spiritual and emotional ways. I met people who stood as inspiration for who they are and

1 KESPEM are Centres of Education for Muslim Children in Greece in the area of Thrace. They offer lessons in Greek language for Muslim children and their mothers, help with their homework, common recreational activities for Muslim and non-Muslim children, and general assistance with educational advancement and integration of the Muslim children in the society in Greece. They have been funded by the European Union and, in smaller part, by the Greek government.

how much they contribute to society with their personal relationships, which necessarily have impact on society. They are members of our societies who care about the feelings of other members and they try to make a society where everyone feels equal in his or her belonging. However, at the same time people have good reasons to feel insecure, uncomfortable, threatened in their identity and even threatened in their physical integrity. These feelings refer to societies with deep social disabilities. What we need is "justice now." The *Right to Democratic Belonging* works on this path and platform. I suggest that we need to understand the right to equal protection of the laws as the *Right to Democratic Belonging* if we want to provide justice for real people in real societies and not "abstract and illusory rights" in societies that don't exist. Our societies are not ideal. They are majoritarian and usually oppressive for their vulnerable members. Our legal theories should take into account these social deficiencies and try to propose a more just model. I propose a normative interpretation of a well-known right. The *Right to Democratic Belonging* answers how the right to equal protection of the laws should be interpreted. The book is an introduction to this theory and it provides a model of analysis.

The book is a part of my doctoral thesis. A draft of the doctoral thesis was submitted to the a seven-member committee on June 20, 2016. The thesis was defended on July 11, 2016 at the National and Kapodistrian University of Athens. Five professors from the University of Athens and two from Queen's University in Canada assessed the quality of the doctoral thesis. Any mistakes in this book remain the full responsibility of the author. I attempted to provide the reader with the simplest form of my suggestion in my doctoral dissertation.

Elena Drymiotou
June 20, 2016
Cambridge, MA, USA

Acknowledgements

I need to thank everyone who contributed to the emotional, spiritual, and intellectual journey of producing this book.

First, I thank my parents. They have supported me during this journey in all possible and impossible ways. Having their support made me realize, among other things, that some other people do not have such support. In this sense, I do acknowledge that I have been highly privileged in my life.

I am also grateful for my teachers and mentors. I thank my supervisor Professor Nikos Alivizatos, with whom I was discussing my ideas even in their earliest form. I thank him for his teachings for understanding law both as a norm and how this norm takes form as a part of the real life for real people in a real society. I thank him for his mentorship, his love not only for teaching but helping his students and encouraging them to find their own intellectual path. I am grateful to have had Professors Georgios Gerapetritis and Theodora Antoniou in the Advising Committee of my thesis. They express their concerns with equality through genuine and sincere academic and social interest. Their writings were some of my first readings on equality and served as part of my general background on understanding the issue. The insights of all the three professors contributed during my effort to navigate more independently the vast conceptual sea of equality.

The Canadian Charter, contemporary political philosophy, and Canada itself were each part of a new world that I have started exploring in January 2011. Professor Will Kymlicka accepted me as a Visiting Scholar at Queen's University in Kingston in 2011. I discussed my ideas with him in their early stage and he facilitated my research in Canada. During my six months at Queen's, I pursued one of the most significant parts of my research. I studied the Canadian Charter and, almost as a beginner, contemporary political philosophy. I am also grateful for meeting Professor Beverley Baines during my fellowship at Queen's. She was always willing to discuss my research questions and she encouraged me while I was trying to understand the jurisprudence over Section 15. She continued offering her help even when I left Canada. This was my first academic fellowship, my first overseas trip, and my first time living in cold landscapes with snow. It was, in many ways, a landmark experience in my life.

Professor Martha Minow supported my application to become a Visiting Researcher at Harvard Law School in 2014. During the one and a half years of my fellowship, I audited terrific courses at Harvard University, and I pursued most of my writing at the Langdell Library. Professor Minow generously offered me her help during my fellowship, and she continued her generosity after my fellowship. She offered me help through her emails, books and our oral discussions. My fellowship at HLS was another landmark developmental and unique life experience.

I certainly thank also my friends who supported me during the journey of my Ph.D. Friends in Cyprus, Greece, London, Canada and the United States supported me with their humor, patience, encouragement, and more generally, their friendship and love. I could fill the pages here with names and anecdotes, but I need to save them for my legal analysis and ultimate suggestion.

One of my realizations at the end of this journey is that I have been a "product" of a kind of an affirmative action program for undergraduate admissions to the University of Athens. I was admitted as a Greek from Cyprus. I therefore took the admission exams in Cyprus, which are different from the exams in Greece, as they take place in Cyprus under the auspices of the competent Ministry of Cyprus. No one can say which of the two exams is more demanding. But, they are certainly different. As an eighteen year old in Athens, I was first called to try to belong to the community of students in the university. It was also the first time I tried to belong to new groups of friends in Greece. I had to soften my Cypriot dialect to facilitate communication with my new friends in Greece. I had to find my place in my new city and school. At the same time, I started trying to find my way and choose the way I want to belong to a democratic society as an adult.

I am grateful for the people I have met and experiences during my journey of starting the research for and then writing this book. Without them, my journey could not be the same. I could not be the same as I am without them. The evolution of the ideas of this book has been dramatic, since I started my Ph.D. in 2009. My own change is similarly dramatic. I enjoyed very much this journey and certainly, if I could choose the journey again, I would choose it to be exactly the same.

Introduction

I. Belonging and Belongings: Eight Stories

The verb "to belong" can be used in many ways. For instance, think first of a three-year-old girl.

Story 1

This little child feels that the first group she belongs to is her immediate family – her parents. This is her first relationship. Her parents are her home; "her place" in the strictest sense.

Story 2

For her second group, this little child feels like she belongs to her extended family and friends. She has grandparents, uncles, aunts and cousins, some of them are more extended family than the others. In one sense, she belongs to this group of relationships of love and care, perhaps full of story-telling and toy times. These people are her home in a broader sense.

She goes also to the kindergarten school. She may feel more comfortable with some of the children, and not so comfortable with some other children. She may belong to a certain group of children, who are her friends, but for the moment, she does not belong to a group of children that she may say that "she does not love."

Story 3

I suppose that the little child has never yet reflected about her belonging in the world in a spiritual way.

Story 4

The little child may have thought about how she feels as a member in the class at a kindergarten or her family or her group of friends. But, certainly, she has

never thought about how she belongs to the State in the eyes both of the government and the other members of the State.

Let's now look at the life of a female adult.

Story 5

Turning eighteen years old, she obtains the right to vote. She may start thinking how is to belong to a democratic society and what does this right means for her belonging in a democratic society.

Story 6

As an adult, she may start thinking about her belonging to new types of relationships: relationships with colleagues, romantic relationship(s) or marriage.

Story 7

She has been a part of a group of friends for years. They all share some ideas and they spend time discussing, developing and practicing their ideas. These ideas can be political, and/or spiritual, and/or social, and/or scientific and/or about certain cultural or other recreational activities. However, at some point of her life, she has changed her ideas over a certain topic she shared with this group of friends for years. Now, she may start thinking whether her belonging to this certain group of friends has somehow changed.

Story 8

She uses the public transportation everyday. She notices every morning this warning: "please keep your clothing and belongings clear of the door."

In the above eight typical stories of the life of a little child and an adult, we can examine basic groups one person can feel they belong to in comparison to the use of the noun "belongings." Therefore, a person can belong to many groups. Some basic groups the person may feel they belong to, some even from her or his childhood, are the following: family, a group of friends, a romantic relationship, a group of colleagues, a group of comrades about any ideas or activities, a democratic society, and in the world generally. Also, people usually, when they talk about their property, refer to their belongings. The above seven stories relate to the sense and way of belonging of a person or her/his "belongingness" to a group, while the last story relates to the belongings of a person, in the sense of her property.

I have presented the above notions and stories to provide examples of the broad notion of "belonging" or "belongingness" and "belongings" to explain more clearly the one I deal with in this book. In this book, I will talk only about the "belonging to a democratic society." Therefore, this book is about

the right to belong as equal in a democratic society. It is, in other words, a thesis about *the Right to Democratic Belonging* in the society.

II. Summary of the Chapters

Part I of the manuscript is composed of two chapters. Chapter 1 is an introduction to the understanding of "the right to equal protection of the laws" and integration in terms of "belonging." It is therefore the introduction to the very basic thesis. In Chapter 2, I define democratic society. This is "a participatory community of equals." Part I has served as an introduction to both the suggested understanding of "the right to equal protection of the laws," and the frame within which the rights are defined, redefined, limited, or even violated. Part I constitutes, therefore, a two-fold introduction.

Part II explains the first analytical pillar regarding the scope of the right. The scope of the right of the general theory has been analyzed in four chapters. I explain three inherent rights. First, Chapter 3 defines the *right to equally secure belonging or the right to secure belonging in a community of equals.* I suggest a non-exhaustive list of contextual factors, which contribute to the violation of *the right to equally secure belonging.* These factors include: (i) stereotype; (ii) prejudice; (iii) perpetuation and/or worsening of a preexisting disadvantage; and (iv) any other form of [non-identity] oppression which may demean the secure/safe belonging in a community of equals. My purpose in Chapter 3 is not to provide a comprehensive or exhaustive analysis of contextual factors; rather, my purpose is to identify some possible contextual factors, which may demean *the right to secure belonging in a community of equals* and thus, are strong indicators of its violation.

Chapter 4 analyzes *the right to* "free-identity" belonging *in a community of equals.* Four contextual factors are relevant for the establishment of the violation of *the right to* "free-identity" belonging *in a community of equals*; (i) be integrated and immersed in the larger society, if one so desires; (ii) be integrated, but also being distinct in the larger society, if so desire; (iii) be excluded from the general laws and regulations, under certain conditions; and (iv) enjoy the right to self-governance, under certain conditions. I haven't offered a comprehensive debate on the above four contextual factors of *the right to "free-identity" belonging in a community of equals.* Rather, my purpose has been to identify some possible relevant factors, which may affect the equal identity freedom and the way one belongs in a democratic society as equal, in respect of her/his identity. Thus, these contextual factors serve in the analysis as indicators for the violation of *the right to* "free-identity" belonging *in a community of equals.*

Chapter 5 analyzes *the right to minimum comfortable belonging in a community of equals.* This right is a by product of the two other rights; *the rights to secure and/or* "free-identity" belonging *in a community of equals.* It refers to the lack of anxiety, because of the threat or violation of, at least, one of the above two rights. In this sense, the right does not refer to a general lack of

anxiety, but a specific lack of anxiety, which results from the risk of violation or violation of at least of one of the two other inherent rights in *the right to equal belonging*. It is, in this sense, a minimum equal comfort in a democratic society, which is protected. Again, my purpose in this chapter is not to provide a comprehensive theory of what it means to belong in a minimum comfortable way in a community of equals. Rather, my purpose is to emphasize that there can be ways of emotional oppression, which demean *the right to equal belonging*. In other words, my purpose has been to indicate the emotional aspect of "the right to equal protection of the laws."

Chapter 6 explains clearly both *the two primary relationships* and *the grounds of unequal belonging*. The whole analysis is based on the understanding and the comparison of *two primary relationships*: (i) the relationship of the needs of "the Designated Beneficiaries" to the *Good of Reference*, which is the benefit provided by the impugned legislation understood in a purposive way, and (ii) the relationship of the needs of the "Claimant" to the same *good of reference*. Chapter 6 defines also *the grounds of unequal belonging*. *Grounds of unequal belonging* are those grounds which in the particular context trigger suspicions of violation of, at least, one of the three inherent rights in *the right to equal belonging*. The grounds of distinction are understood in a purposive, substantive and contextual analysis. They contribute to the analysis of the *Right to Democratic Belonging* only if they constitute *grounds of unequal belonging*. Upon this analysis, some consequences have been seen. Singular ground and fixed ground based approaches, mirror comparator approaches and approaches which neglect either the inter- or intra- group disadvantage of unequal belonging are rejected. The suggested approach is substantive, relational and contextual.

What I do in Chapter 7 of the general theory is to define *the minimum content of the right*. To put it positively, it is "the right to rule your self, to self identification and self development." This is something close to the basic equal freedom and equality in the sense of non-dominance. As this is too vague to be a useful legal tool, I try to apply these ideas on the contextual factors which indicate violation of *the right to equal belonging*. I conclude that these are all factors which indicate the *perpetuation or worsening of a disadvantage which threatens your freedom to self-rule, self-development and self-identification*. Therefore, the perpetuation, and even more, the worsening, of a preexisting disadvantage which threatens the freedom to self rule, self-development and self-identification are the contextual factors, which indicate violation of *the minimum content of the Right to Democratic Belonging*. As I explain, to put it negatively, this is *the right to non-dominance*.

Part IV is composed of Chapter 8 and it presents the conclusions of the general theory. I explain the conclusions on the nature of the right. For this purpose, the explanations over the relation among the inherent rights and the relation between the inherent rights and the ultimate right are of central significance. I also illustrate the conclusions in a basic figure of concentric circles to facilitate the understanding, learning and teaching.

A Glossary is provided at the end of the manuscript. However, it can be used even now before the reader starts reading the coming chapters. In this way, the Glossary can introduce the reader to the main terminology and definitions. Furthermore, the reader can trace each term in the Glossary once she/he meets a term in italics introduced as a new term while reading the coming chapters.

Part I

Introduction to Equal Belonging in a Democratic Society

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1 An Introduction to an Interpretation of Equal Protection of the Laws and Integration in Terms of Belonging

Introduction

The argument of this chapter is that both "the right to equal protection of the laws" and the idea of integration can be understood in terms of belonging and that there is a link between the two. The argument starts by suggesting that the general "right to equal protection of the laws" should be understood in terms of belonging. The reader is introduced to the suggestion that the equal protection of the laws means a *Right to Equal Belonging in a Democratic Society* (section I). It is then explained that integration can be understood in terms of belonging too. It is indicated that integration may also mean an equal belonging in a democratic society (section II).

I. Equal Protection of the Laws in Terms of Belonging

The equal protection of the laws should be understood in terms of belonging. The way one belongs to a group is the way one stands in relation to the other members of the group, in respect of certain goods of reference the group provides to its members. Belonging to a group means membership. The way one belongs to a group is thus the quality of one's membership. Whether one enjoys equal membership in a group is a matter of whether one equally belongs to this group.

Dred Scott v. Sandford,[1] *Plessy v. Ferguson*[2] and *Brown v. Board of Education of Topeka*[3] promote two distinct and opposing models of membership in the society. On the one hand, the two former decisions illustrate the model of non-belonging in a community of equals. On the other hand, the latter promotes a model of belonging in a community of equals. This is a community whose members are of equal worth.

Dred Scott was clearly excluded from the larger American society.[4] He was among the enslaved African Americans of his time. He spent time in the free

1 Dred Scott v. Sandford, 60 U.S. 393 (1857).
2 Plessy v. Ferguson, 163 U.S. 537 (1896).
3 Brown v. Board of Education, 347 U.S. 483 (1954).
4 *See also* Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 48 (1991), (pointing out that Justice Roger Taney "understood that the problem

states. He sued then for his freedom. The Court, cynically affirming his arbitrary exclusion from the society of equals, held that Dred Scott was not "a person" for the purposes of the Constitution. He was a slave, not a citizen. Therefore, he was not entitled to sue. He could not have standing before the court and his "claim" was procedurally not even a claim. The Court did not have any jurisdiction to decide his "claim."

Dred Scott did not belong in the larger American society as an equal. He belonged to his master with the rest of his master's property. He was, according to the Court, "a part of the slave population rather than the free."[5] His claim was nothing else, but a "claim" to have an equal place in the larger society, in its most basic form: to be recognized as free and equal, as he was born,[6] and be free from domination of other people. His exclusion was a violation of the most basic form of equality. The violation of his freedom was so deep as to violate the absolute core of all human rights, that is, human dignity and respect. The Court's decision was thus a regretful declaration that Dred Scot did not belong in the society in its most basic form; that is the equal belonging to the universal family of human beings.

Then in 1890, the Separate Car Act from the state of Louisiana was passed. The Act required separate accommodations for blacks and whites on railroads, including separate railway cars. In 1892, Mr. Homer Plessy refused to obey. He instead sat in "the whites-only" railway car. He was asked to sit in the "correct" car, "the blacks-only" one. He refused, he was arrested, and he was remanded for trial. In 1896, his case finally reached the Supreme Court of the United States, challenging the law of Louisiana as a violation of the Thirteenth and Fourteenth Amendments of the Constitution of the United States.

Mr. Homer Plessy was asking for something more than merely the freedom to choose his seat in the railway car. He was asking for an equal place in the larger society. He did not want to live in a separate segment of the society that

of slavery was a debate over the nature of the national citizenship."). According to Karst, "[t]he infamy of the Dred Scott opinion, however, lay elsewhere: in its smug assumptions of racial superiority; in its shameful equation of citizenship with whiteness; in its sweeping exclusion of black people from belonging to America; in its bland acceptance of their relegation to an inferior caste." *Id.* at 44–45.

He goes on to say: "[w]hat matters most about Taney's opinion today is not his appalling racist smugness, or even his reading of history; what is important is that his assumptions about racial inferiority and exclusion from citizenship were just what the drafters of the Civil War amendments and the civil rights acts of the Reconstruction era sought to overturn. Henceforth, there was to be no 'dominant race' and no 'subordinate and inferior class of beings,' but only citizens." *Id.* at 49.

5 Dred Scott v. Sandford, 60 U.S. 393, 411 (1857) (stating that they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free.).

6 There were different types of suits of freedom and [most of them] did not however challenge the "slavery" itself. For more details of what was a freedom suit, how a slave could reach the Supreme Court of the United States and have a lawyer, see Lea Vandervelde, *Redemption Songs: Suing for Freedom before Dred Scott* (2014).

was forcibly chosen and constructed for him. He was challenging his arbitrarily inferior membership in the society. He was claiming to belong to the larger American society as a member of a community of equals. A minimum sign of this equal belonging would be his choice for any available seat in the railway car. However, the Court held that "separate but equal" was constitutional.

The Court overturned *Plessy* in 1954. The Warren Court[7] concluded that the doctrine of "separate but equal" has no place in the field of public education. It clearly declared that "[s]eparate educational facilities are inherently unequal" and that such segregation is a denial of the equal protection of the laws.[8] For the Supreme Court of the United States in *Brown*, the main question was whether segregation deprives the black children of equal educational opportunities. The Court explained:

> [t]o separate them [the Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[9]

Thus, the Court talks about a feeling of inferiority as to the status of the African American children in the community which causes a particular harm. Let's analyze the above statement word by word. First, in the Court's understanding, it is a feeling which is at stake. Feelings exist in a relationship. Second, it was about a feeling of inferiority. It was about a feeling of the black children that white children are superior to them. Third, the Court talks about the feeling of inferiority regarding the status of the children. In other words, the Court connects the feeling of inferiority to the place these children feel that they have in the society. Fourth, the Court found that such is the harm caused by the feeling of inferiority that it may affect the hearts and minds of the children in an irreversible way. One could only rhetorically ask what kind of harm could be more serious than an irreversible harm caused in the heart and mind of a child? The feeling of inferiority of the black children as to their status in the society, which the Warren Court referred to, can be paraphrased in terms of belonging. The above wording of the Warren Court is just a different way of describing the black children's feeling of being inferior members of the society.[10] In other words, the community of equals is understood based on children's feeling of having or not having equal belonging.

The Warren Court quoted the Supreme Court in Kansas in its factual finding on the connection between this feeling of inferiority caused to the black children and their motivation to learn. The opinion of the Supreme Court of

7 Earl Warren served as a Chief Justice at the Supreme Court of the United States from 1953 until 1969.
8 Brown v. Board of Education, 347 U.S. 483, 495 (1954).
9 *Id*. at 494.
10 In contrary, one can notice that the Warren Court did not make references on feelings of superiority of the white members of the society.

Kansas cited social science developments which their factual findings confirmed. In particular, the Kansas Court had found that this feeling of inferiority influences in a negative way the motivation of the children to learn. It had also pointed out that the impact is greater when it has the sanction of law, as such policy denotes the sense of inferiority. The Court then concluded that segregation with the sanction of law has a tendency to delay the educational and mental development of black children and to deprive them of some of the benefits they would otherwise receive in a racially integrated system.[11] Thus, the Kansas Court talked about the nature of the specific harm that segregation causes to black children, connecting the feeling of inferiority caused to them to a worsening in their motivation to learn.

Reflecting on "the right to equal protection of the laws" in education between a black and a white child under the facts of *Brown*, one can see a triangular relationship. It is a relationship between the State, which provides the education, and these two children. Let's say that the good of education is the *good of reference* in this example. Under conditions of equality, the relationship of each of the two children with the State, should be equal in respect of the *good of reference* and then in comparison and in relation to each child. But the quality of relationships is determined by some general parameters like distance/proximity, communication/lack of/weak communication, trust/distrust, safety/insecurity, care/indifference, comfort/discomfort and fairness/injustice. There are therefore *two primary relationships.* The one is the relationship between the *good of reference*, offered by the State, and the black child. Think of this relationship, under conditions of equality, in the following figure:

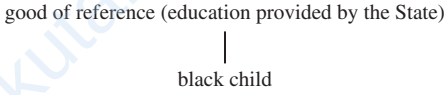

Figure 1.1 Relationship A

The second primary relationship is the relationship between the same *good of reference*, offered by the State, and the white child. Think of this relationship in the following figure:

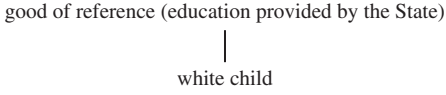

Figure 1.2 Relationship B

11 *Brown*, 347 U.S. at 494 (reporting that the effect of this separation on their educational opportunities was well stated in a finding in the Kansas case, where the Supreme Court of Kansas nevertheless felt compelled to rule against the Negro plaintiffs.).

Then, we need to compare these two relationships and see if there is inequality between them. Under conditions of equality, the two above relationships seem to be equally close. Trust, freedom, communication, security, comfort are some of the parameters which make the participants in a relationship close. The lack of these parameters will distance the participants of the relationships. In this sense, at least, under conditions of equality, the distance between the children and the *good of reference* in the above two relationships is equal.

To treat the two children differently by separating them because of their color and providing fewer educational opportunities to the black child, was, according to the Warren Court in *Brown*, an arbitrary differential treatment and it was discriminatory. We can perhaps think this comparison of *the two primary relationships* under conditions of inequality in the following figure:

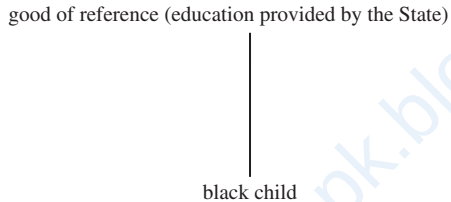

Figure 1.3 Relationship A

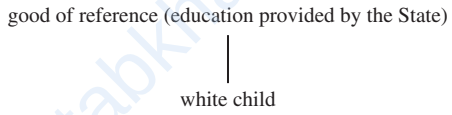

Figure 1.4 Relationship B

An unequal relationship with the education provided by the state means an unequal relationship with the *good of reference*. One can see in the above figures that the distance of the black child to the *good of reference* is longer than the distance the white child had to the same *good*. This illustrates inequality in their relationships to the same *good of reference*. If one tries to put together the above figures of *the primary unequal relationships*, one will observe a non-isosceles triangle.

Ultimately, unequal relationships of the two children to the certain *good of reference* of education offered by the State means an unequal belonging to the State. As Chief Justice Warren said, "[t]oday, education is perhaps the most important function of state and local governments […]. It is the very foundation of good citizenship."[12] Karst finds that Chief Justice Warren was building a nation in *Brown*.[13]

12 *Brown*, 347 U.S. at 493.
13 Karst, above note 4, at 198.

Donna Greschner has also understood the purpose of the equality rights under section 15 in terms of belonging. She suggests that equality rights ensure belonging to three main communities: to the universal community of human beings, the political communities in Canada (federal, provincial and territorial), and to the identity communities. Greschner suggests that "the Constitution as a whole protects belonging in the human family (by virtue of containing human rights), identity groups and political communities."[14] For her, the special contribution of the equality rights under section 15[15] is to protect "our belonging in identity groups, that our membership is not used in discriminatory ways by the larger society."[16] Greschner therefore describes a distinct and unique content of the equality rights in comparison with the other rights, explaining:

> [t]he harm that section 15 seeks to overcome and prevent is exclusion from communities on the basis of the enumerated or analogous grounds. It aims to prevent not only exclusion by explicit membership criteria – the formal rules of exclusion – but also by the more indirect and less formal ways in which people are marked as second class, as less than full members and not permitted to participate fully in the opportunities and riches of a society.[17]

Under this understanding, Greschner sees that "judges must determine whether persons have suffered the harm of exclusion in a way that the Constitution forbids."[18] In positive terms, she sees that "the judicial task in interpreting section 15 is to determine the appropriate meaning of belonging."[19]

Kenneth Karst, in his book *Belonging to America* understands the equal protection of the laws in terms of equal citizenship. He defines the principle of equal citizenship, as follows:

> [e]ach individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a non participant. The principle thus centers on those aspects of equality that are

14 Donna Greschner, "The Purpose of the Canadian Equality Rights", 6 *Rev. Const. Stud.* 291, 306 (2001–2002).
15 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 [U.K.] c.11, section 15 (Can.) [hereinafter *Canadian Charter*].
16 Greschner, *above* note 14, at 305.
17 *Id.* at 306.
18 *Id.*
19 *Id.* at 316.

> most closely bound to the sense of self and the sense of inclusion in a community.[20]

Karst clearly understands equal citizenship in terms of belonging. He finds that the need to belong is a matter of personal identity because

> [t]he most heartrending deprivation of all is the inequality of status that excludes people from full membership in the community, degrading them by labeling them as outsiders, denying them their very selves.[21]

For Karst, the question of belonging is "who was included within the boundaries of the [American] community?"[22] He recognizes the failure of the "existing language of rights, of liberation, even of equality in its traditional usage […] to express the full meaning of citizenship as belonging."[23] Karst presents historical examples to show how the American legal doctrine of constitutional equality "bear on particular aspects of the question, Who belongs?" He further tries to persuade American lawyer readers that "a number of issues they have customarily seen as questions about freedom can also be seen as questions about belonging."[24] For Karst,

> [t]o understand the meanings of the question, Who belongs? and to ask how our constitutional protections of equality come to bear on the answers to that question, we need to make a series of discrete inquiries: into the foundations for community and the varieties of belonging; into the sense of community as the matrix for individual identity; and into the meanings of equal citizenship in the American civic culture, both as an ideal and as a principle of constitutional law.[25]

Will Kymlicka, who advocates for a multicultural citizenship, understands that our sense of cultural identity depends on criteria of belonging.[26] He shares the view and advocates for "safety of effortless secure belonging."[27] The model of equality Kymlicka draws upon for his theory is a model of equality as non-dominance. He observes the dynamics of power which define the people's relationships. He calls liberal egalitarians to be concerned not only about redistributing income from the advantaged to disadvantaged, but also about

20 Karst, *above* note 4, at 3.
21 *Id.* at 4.
22 *Id.*
23 *Id.* at 213.
24 *Id.* at 11.
25 *Id.* at 13.
26 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 89 (1995) (quoting Avishai Margalit and Joseph Raz, 'National Self-Determination', 87(9) J. Phil, 447–449 (1990)).
27 *Id.*

ensuring that the advantaged do not have the power to define relationships of dominance and servility.[28] He suggests that this cannot be achieved through the traditional tax and transfer schemes of the welfare state, but requires instead increasing the *ex ante* endowments people bring to the market.[29] Therefore, for Kymlicka, positive action is needed to ensure relationships of non-dominance, which can provide "safety of effortless secure belonging."

In another piece of Kymlicka's work, it is again obvious that he understands that the idea of shared citizenship is linked to certain types of feelings such as feelings of belonging. As he says:

> [it] goes beyond the sharing of citizenship in the formal legal sense (that is, a common passport) to include such things as: feelings of solidarity with co-citizens, and hence a willingness to listen to their claims, to respect their rights and to make sacrifices for them; feelings of trust in public institutions, and hence a willingness to comply with them (pay taxes, cooperate with police); feelings of democratic responsibility, and hence a willingness to monitor the behaviour of the political elites who act in our name and hold them accountable; and feelings of belonging to a community of fate (that is, sharing a political community).[30]

Indeed, all the above feelings can be seen falling in one broader conceptual family of sharing. It is, as Kymlicka says, the shared membership or, in other words, the way of belonging in a democratic society. Feelings of solidarity, feelings of trust in public institutions, feelings of democratic responsibility, and feelings of belonging to a community of fate are all types of belonging and specific forms of a democratic belonging.

Greschner, Karst and Kymlcka have explicitly linked equality, equal membership in the society, and belonging to this society. A more implicit link between belonging and equality can also be found in the understanding of equality as presented by Sheppard, Baker, Minow, Fiskin, and other scholars who understood the equal protection of the laws in terms of anti-subordination.

Colleen Sheppard advocates for an inclusive equality, and she views citizenship as a means for having rights and belonging.[31] She understands the legal

28 Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 90 (2001).
29 *Id.*
30 Keith Banting, Thomas J. Courchene and F. Leslie Seidle, "Conclusion: Diversity, Belonging and Shared Citizenship" in Volume III, *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (ed. Keith Banting, Thomas J. Courchene and F. Leslie Seidle) 652 (2007) (quoting Will Kymlicka, 'Ethnocultural Diversity in a Liberal State: Making Sense of the Canadian Model(s)' in Volume III, *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (ed. Keith Banting, Thomas J. Courchene and F. Leslie Seidle) (2007) and stating that "Kymlicka encapsulates core elements of the idea of shared citizenship."), *see also* Kymlicka, *above* note 30, at 71 (discussing long-term sustainability).
31 Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* 136 (2010).

right to equality as "being informed by a concern with substantive outcomes,"[32] "promoting inclusion in the decision-making processes of everyday life," and breaking "cycles of exclusion."[33] Sheppard calls for social solidarity focusing on the re-invention of our relationships,[34] so as to re-invent a more inclusive society. She argues for an inclusive vision of shared community identity that respects group-based differences.[35] One can clearly see that inclusive society is composed of relationships where people have equal belonging to this society.

Sheppard goes on to make references to the jurisprudence of the Supreme Court of Canada, equivocating equality with democratic participation.[36] In particular, she sees that substantive equality is recognized as being undermined when individuals and groups are "marginalized, ignored, devalued." Instead, substantial equality is reinforced when all individuals and groups are granted "a place in society."[37] She also understands that "it is relevant to consider whether the distinction restricts access to a fundamental social institution or it affects "a basic aspect of full membership in Canadian society," or "constitute[s] a complete non recognition of a particular group."[38] Sheppard thus understands that the Supreme Court of Canada has connected equality, democracy and membership. Equal belonging in a society is another way to say "equal place in the society," "equal membership" or Sheppard's concept of equal participation.

Baker interprets equal protection of the laws as "equality of respect."[39] This model of equality consists of three principles. The first is about political participation, which requires a state to recognize the fundamental nature of people's right to participate in a political process that chooses and attempts to implement the group's conception of a good society. The second principle is one of non-subordination. Accordingly, the political process must not further individuals' preferences, which would inherently subordinate or denigrate the inherent worth of any category of citizens. The third principle is about resources and opportunities. According to this principle, the state must guarantee to everyone those resources and opportunities that the existing community treats as necessary for full life and participation in that community.[40]

32 *Id.* at 4.
33 *Id.* at 4. Sheppard further points out that, "[i]ndividual and group agency as well as social solidarity in everyday contexts are critical precursors to equality" and that equality "must be built from below." *Id.* at 4–5.
34 *Id.* at 4–5.
35 *Id.* at 140.
36 *Id.* at 127.
37 *Id.* (referring to Law v Canada (Minister of Employment and Immigration [1999] 1 S. C. R. 497, at para. 53)).
38 *Id.* (quoting *Law*, 1 S. C. R. 497, at para. 72).
39 C. Edwin Baker, "Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection", 131 *U. Pa. L. Rev.* 933 (1983).
40 *Id.* at 959.

Baker's three principles are pillars of protecting equal belonging in the community for all. In his suggested model, "[c]hoices with a purpose to subordinate or denigrate some portion of the community are barred as inconsistent with the vision of politics that assumes respect for all."[41] The collective decision-making process correctly represents a process under conditions of non-domination.[42] This model is close to a non-domination model which protects the worst off members of the society.

The protection of the worst off is a theme reflected in Baker's perception of the role of the judge in a democratic society. Explaining his model of equality, he points out that "[t]he [equality] guarantee only prohibits certain community choices." These are the community choices which "leave some people without the prerequisites for full and meaningful life." Other community choices are not covered. His theory "leaves other choices, and even the responsibility to determine what amounts to these 'prerequisites,' to collective decision."[43] The society does not foreclose to anyone meaningful life and full participation as it understands these notions.[44] For this reason, "[l]aws that burden groups primarily composed of the 'worst off' members of society should be suspect. Both these burdens and any limitations on the fulfillment of basic needs will seldom advance the interests of the worst off."[45] Protecting the worst off is not a preferential treatment. It is a need to protect democracy and equality from abuse of the power of the majority. It is a need to protect vulnerable people from unequal belonging to a democratic society and then becomes a need to protect democracy.

Martha Minow contemplates a theory that she calls "the dilemma of difference." The dilemma is whether and when identical or differential treatment stigmatizes or hinders people and when the treatments do not.[46] As Minow states, "[t]he meaning of many differences can change when people locate and revise their relationships to difference. The student in a wheelchair becomes

41 *Id.* at 966.

42 *Id.* at 971. As he explains: "[t]he process can be envisioned as a spiral. By forcing politics to go beyond existing conditions of domination, the constraints operate as the level that raises the cycle of societal change into a spiral of increasing equality and decreasing domination. As the constraints help produce practices and institutions that increasingly recognize people's basic equality as moral beings (this equality being Rawls' central value and the value he tried to embody in the original position), we develop an increasingly reliable basis for trusting our judgments concerning which collective choices and social institutions are just and whether the collective decision making process correctly represents choice under conditions of non domination." *Id.*

43 *Id.* at 967.

44 *Id.* at 969.

45 *Id.* at 941–942.

46 Martha Minow, *Making all the Difference: Exclusion, Inclusion and American Law* 20 (1990). In her own words, the dilemma is expressed as follows: "when does treating people differently emphasize their differences and stigmatize or hinder them on that basis? And when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that basis?"

less 'different' when the building, designed without him in mind, is altered to permit his access."[47] In terms of belonging, if the building changes to respond to the needs of the student, the distance in the relationship between the student and the school is reduced, since the student can feel more attached to the school. Thus, the student can have a closer relationship to the school and all the good of education provided by and within the school. It will then be more likely that the student will start feeling that he/she has a more equally secure and comfortable belonging in the process of learning and the community within the school.

Fiskin's pluralist model, which he calls "opportunity pluralism" can be also understood in terms of belonging. He argues for four principles or conditions that, together, define opportunity pluralism.[48] As he explains, the principles are the following:

> 1. There should be a plurality of values and goals in the society, in the sense that people disagree both about what kinds of lives and forms of flourishing they value and about what specific goods and roles they want to pursue. 2. As many as possible of the valued goods should be non-positional (or less positional) goods, while as many as possible of the valued roles should be non-competitive (or less competitive) roles. 3. As far as possible, there should be a plurality of paths leading to the different valued goods and roles, without bottlenecks constraining people's ability to pursue those paths. 4.There should be a plurality of sources of authority regarding the elements described in the other principles. Rather than a small coterie of gatekeepers deciding what it takes to pursue crucial paths, there should be a broader plurality of different decision – makers with the power to enable a person to pursue a path and society should enable individuals themselves to create new paths.[49]

The third principle provided above, termed the "anti-bottleneck principle," incorporates three types of bottlenecks: (a) a qualification bottleneck; (b) a developmental bottleneck; and (c) an instrumental-good bottleneck.[50] The first type includes test scores and all the requirements for accessing a path one chooses to follow. The second includes all these developmental opportunities a person needs in order to be able to pursue the selected path. Developmental opportunities which are themselves scarce are seen as bottlenecks themselves. The third type of bottleneck includes all the goods which can "buy" access to a certain path. Money and social status are seen to fall within the third type of

47 *Id*. at 12.
48 Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* 131, Part A (2014).
49 *Id*. at 131–132.
50 *Id*. at 157–158, 56.

bottlenecks. All three bottlenecks are subtypes or subcategories within the same phenomenon of unequal belonging.

All of the above principles are also suggested as conditions. As Fishkin explains, "[t]o the degree that they are satisfied, together they describe a society structured according" to what he calls, "the pluralistic model."[51] A "unitary model," as he calls it, is described as "the inverse of the four conditions."[52] As he says, "[de]scriptively, in any real society, the opportunity structure will fall somewhere in between the ideal types of the unitary and pluralistic models."[53]

The pluralist understanding of Fishkin is another manner to develop a more inclusive society. The pluralistic model describes the path to a successful life within the society as accessible to more people. There is no single path to success, as people are equal before the law but not the same. They may need different ways to reach their goals as equal members of the society. The pluralist understanding of Fishkin delivers with more people having an equal belonging in the society making this society more inclusive.

The debate in the United States over the normative understanding of constitutional equality has been long and ongoing. Most scholars agree to an anti-classification principle[54] – the doctrine of suspect classifications over the judicial review of the equal protection of the laws in the United States. However, there have been scholars who advocated for a different understanding.

Owen Fiss is among scholars who advocated for a principle of anti-subordination instead of the principle of classification. In a very influential article both in Canada and in the United States, he advocates for, as he calls it, "the group-disadvantaging principle."[55] This is a version of the anti-subordination principle.[56] According to the group-disadvantaging principle, "laws may not 'aggravate' or 'perpetuate … the subordinate status of a specially disadvantaged group.'"[57]

51 *Id.* at 132.
52 *Id.*
53 *Id.*
54 Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassifcation Values in Constitutional Struggles over *Brown*", 117 Harv. L. Rev. 1470, 1473 (2003–2004). As Siegel reports, "[s]cholars debate what our constitutional understanding of equality ought to be, but most would agree that American equal protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century." *See also id.* at 1472 (reporting that today many understand *Brown* as supporting an anticlassification principle.)
55 Owen Fiss, "Groups and the Equal Protection Clause", 5 Phil. & Pub. Aff. 107 (1976).
56 Siegel, *above* note 54, at 1473 n. 8.
57 Fiss, *above* note 55, at 108, 157. Siegel, *above* note 54, at 1473 n. 8 (quoting Fiss). (See for quotations in the Canadian scholarship *e.g.*, Beverley Baines, "Equality, Comparison, Discrimination, Status" in *Making Equality Rights Read: Securing Substantive Equality Rights Under the Charter* 74–75 (ed. Fay Faraday et.al., 2009); *see also* Colleen Sheppard, *Study Paper on Litigating the Relationship between Equity and Equality* prepared for the Ontario Law Reform Commission

Fiss explains the strict scrutiny standard of judicial review differently as it would be under the anti-discrimination and anti-classification principle. The strict scrutiny standard of judicial review is a rigorous standard of judicial review applied in the Supreme Court of the United States in cases regarding racial classifications, amongst other topics. According to Fiss, the scrutiny is stringent because the status of an already subordinated group is being threatened. Instead, under the antidiscrimination principle the strictness of the scrutiny depends on a judgment about which interest is fundamental and which criteria are suspect.[58] He believes blacks in the United States should be viewed as a group that is relatively powerless in the political arena and that this powerless status justifies a special judicial solicitude on their behalf.[59] In other words, Fiss aligns with the explanation that the equal protection of the laws protects from threats of unequal belonging in the society and that the judge has a special role to protect that unequal belonging. Fiss has argued that "[the American] Constitution – in particular the Equal Protection Clause – is most fundamentally a design of democratic community."[60] Connecting the dots, the understanding is that the constitutional guarantee of equal protection guards a democratic belonging that is compatible and perhaps read into Fiss's work.

Other American scholars understood equal protection of the laws in similar measures, as Siegel comprehensively recounts.[61] Derrick Bell argued also for an understanding of the equal protection of the laws in terms of group subordination. Consequently, he called for a more rigorous judicial review over laws which burden a racial minority.[62] Catharine A. MacKinnon also argued that, "courts should inquire 'whether [a] policy or practice … integrally contributes to the maintenance of an under-class or a deprived position because of gender status.'"[63] MacKinnon repudiated a model of equality focused on "difference" in favor of one that analyze dominance.[64] Laurence Tribe,

36 (1993) (referring to Fiss's suggestion that the group disadvantaging practices should be the focus of the equal protection analysis).

58 *See generally* Fiss, *above* note 55, at 167.

59 *Id.* at 153.

60 Joshua Cohen & Joel Rogers, "Editors' Preface", *in* Owen Fiss, *A Community of Equals, the Constitutional Protection of New Americans* xiv (1999). As they go on to comment:"[w]hereas commentators all agree that the constitutional guarantee of 'equal protection of the laws' condemns discrimination, Fiss goes further, urging that it also bans groups subordination, as incompatible with democratic community." *Id.*

61 Siegel, *above* note 54, at 1470.

62 *Id.* at 1473 n. 8 (quoting Derrick Bell, *And We are not Saved: The Elusive Quest for Racial Justice* 162–177 (1987)).

63 *Id.* at 1473 n. 8 (quoting Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 117 (1979)).

64 *Id.* at 1473 n. 8 (quoting Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 32, 45 (1987)).

advocated that facially neutral state action be analyzed in accordance with an anti-subjugation principle, such that "strict judicial scrutiny would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward a historically subjugated group, or a pattern of blindness or indifference to the interests of that group"[65] This understanding of equal protection of the laws as embracing an anti-subordination principle is compatible with an understanding of the equal protection of the laws in terms of belonging. A risk of domination is a risk of a non-belonging in a community of equals.

This book shares a vision of an inclusive society of equals with all of the above scholars. The link of membership, equality, democracy and freedom can be explained in terms of belonging. An inclusive society of equals can be built only through relationships among equals. Only if the community is among equals can this community be a democratic community. It is to these relationships that every member of the democratic society has the right to equally belong. When we consider the "assumptions"[66] under which the current social structures have been constructed, we can – without much effort and just a minimum of sincerity – admit that we have left some people outside of the circle of full members of the society. Some people have been rendered outsiders just because they did not have the power to influence the construction of current structures that define their relationships. They have been labeled different in the sense of "abnormal" or, at best, in the sense of the "particular" ones, in the negative sense. There is thus an arbitrary structural disadvantage in their relationships with access to at least some of the public goods, like education. But even in an effort to just talk about inclusive societies, one must be cautious of who includes whom, where and based on which moral criteria.[67]

Under a close reading of Justice Sotomayor's dissenting opinion in *Schuette v. Coalition to Defend Affirmative Action*,[68] one could read the idea of "non-belonging" as a violation of the equal protection of the laws. In *Schuette*, the constitutional question was whether a state could prohibit the enactment of race conscious and gender-based affirmative action programs on public university admissions in its state constitution. The U.S. Supreme Court answered in affirmative. It held that the Fourteenth Amendment allows the states to introduce racial or gender based affirmative action programs, but they do not mandate them. Therefore, according to the Court, a state may well prohibit

65 Siegel, *above* note 54, at 1473, n. 8 (quoting Laurence H. Tribe, *American Constitutional Law* § 16–21, at 1514–1521 (2nd ed. 1988)).

66 *See also* Minow, *above* note 46, at 79; *see also* 79–97 (raising the issue of the assumptions upon the society structures are built).

67 I am grateful to my good friend Martine, who read a draft of this chapter and she was emphasizing this point.

68 Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014).

the enactment of affirmative action programs altogether without violating the equal protection of the laws of the Fourteenth Amendment. Justice Sotomayor disagreed and went well beyond the institutional and economic inequality at stake. She expounded with examples of new forms of social discrimination looking beyond forms and words. She talked about the silent thoughts and feelings of "non-belonging" and being "a stranger" attached to discrimination in the daily life. For her, "[r]ace matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'"[69]

A feeling that "you don't belong here" indeed, means "you are excluded from here." At a minimum, it means that "you are not entitled to participate as an equal member." Justice Sotomayor identified the idea of non-belonging or exclusion as a violation of the general "right to equal protection of the laws." At least, what is a stranger to equality cannot be a part of it.

What has been suggested so far is that "the right to equal protection of the laws" should be understood in terms of belonging. A law which provides the message of inclusion and equal membership in a society is presumptively an expression of the equal protection of the laws. *A contrario*, a law which provides to any member of the society with the message of non-belonging in the society certainly violates "the right to equal protection of the laws." While *Brown* is an expression of equal belonging, *Dred Scott* and *Plessy* expresses non belonging or unequal belonging in a society. Equal protection of the laws has a remedial function. It gives equal freedom, equal access, participation, connection and enjoyment of public goods, and overall an equal membership in the democratic society. Equal protection of the laws requires that the laws provide the message that we all belong in the democratic society, which is a participatory community of equals.[70] It is only then that laws provide the message that the society truly values all of its members.[71] But, do all the members of our societies truly and equally belong to these societies?

69 *Id.* at 1676 (Sotomayor, J., dissenting). According to Justice Sotomayor, "[r]ace matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, 'No, where are you *really* from?', regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'" *Id.*

70 I analyze this definition of the democratic society in Chapter 7.

71 *See also* Martha Minow, *In Brown's Wake: Legacies of America's Educational Landmark* 153 (2010). Minow reports that "Pedro Noguera, an expert on the racial gap in achievement, concluded from his research: 'I fundamentally believe that educating all children, even those who are poor and non-White, is an achievable goal, *if* we truly value all children. Of course, that is the real question: Does American society truly value all of its children?'". *Id.*

II. Integration in terms of belonging.

I will argue here that integration can be understood in terms of belonging, or in other words, in terms of membership. I will also argue that integration may mean equal belonging in a democratic society.

To enjoy an equal belonging in a democratic community, one needs to have substantive ties within this community as a whole, and not only with a fraction of this community. However, people may have or choose to have different nature of ties within the society. To belong in a community of equals means, also, that one is equally free to choose, in terms of justice, how to belong to this community. However, whatever separation or differentiation a free belonging may require, it should not constitute such separation which undermines the ability to have equal belonging in the society as a whole. Otherwise, one should accept that, under these circumstances, one does not in fact participate in the whole community or she/he is at least a partial but not a full member of it. One can already see that it is likely that the discussion about equal belonging is a discussion about integration too.

It is perhaps a good way to explain that integration may be a route to provide equal belonging in a democratic society showing the opposite. *Plessy* serves once again in this book as one of the main historical examples of non belonging in a community of equals. Forced segregation is one of the most obvious cases of non belonging in a community of equals. What was at issue in *Plessy* was a state law that compelled under penalties the separation of blacks and whites in railroad passenger coaches. Under this law, it was a crime for either a black or white citizen to enter a coach that had been assigned to citizens of the other color. The Court cynically held that as long as the separate passenger coaches were equal, there was no violation of the equal protection of the laws.[72] *Plessy* confirms that in 1896 the Fourteenth Amendment jurisprudence on equal protection was still at its nadir.[73]

However, Justice Harlan refused to accept that separate in this context could be equal. His dissenting opinion is important, among other reasons, because of his description of a segregated society. He illustrates a picture of an abnormal city which arbitrarily separates the people. The questions posed by Justice Harlan show the abnormality and arbitrariness of separating the people.[74] How normal can be characterized a city with separate walking and

72 Plessy v. Ferguson, 163 U.S. 537, 557 (1896).

73 *See* Karst, *above* note 4, at 61 (stating the same thought and using the word nadir for *Plessy* and the early jurisprudence of the Fourteenth Amendment).

74 *Plessy*, 163 U.S. at 556–557 (Harlan, J., dissenting). In the words of Justice Harlan: "[i]t is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so

driving streets for white and black people, separate sides of a courtroom for blacks and whites, and separation in the legislative halls or public assemblages? Even aesthetically, all these make a completely messy and dissolved picture without any internal harmony and logic. This abnormality depicts an arbitrary division of the world and thus a deep injustice. It is a picture of an arbitrary reform of the world imposed from feelings of superiority and a desire of power and domination.

The above dissolved picture certainly cannot be a picture of a group of people which constitutes one single society. In such an entity of a deep segregation no one can belong to a whole, as there is no single whole. It is possible that one has belonging to one of the separate parts of this entity, but not to any common whole entity. And most of all, this entity cannot be called a city. It can be actually, at the best, two cities or two parallel parts of one merely physically united territory. This entity may represent a physical territorial unity and a kind of physical proximity, but certainly not a single community. This is unfortunately a picture people experienced in the United States during Jim Crow laws, which segregated people in "virtually every place where people of both races might interact in the community public life."[75]

As I have already indicated, Kymlicka who advocates for a liberal multicultural citizenship understands that "the state must be seen as belonging equally to all citizens."[76] As he explains, "[o]ne of the tests of the liberal conception of minority rights is that it defines national membership in terms of integration in to cultural community rather than descent."[77]He quotes Margalit and Raz who very successfully link the sense of belonging to the sense of self, dignity and well being. As they say,

> [o]ur sense of identity depends on criteria of belonging […] Secure identification at that level is particularly important to one's well being[78] […] cultural identity provides an "anchor for people's self identification and the

regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in streetcars or in open vehicles on a public road [p. 558] or street? Why may it not require sheriffs to assign whites to one side of a courtroom and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?" *Id.*

75 Karst, *above* note 4, at 64.

76 Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (2007).

77 Kymlicka, *above* note 26, at 23.

78 *Id.* at 89, quoting Margalit and Raz, *above* note 26, at 447.

> safety of effortless secure belonging, dignity and self respect of the members of the culture.[79]

The "safety of secure belonging" Margalit, Raz and Kymlicka are talking about seems to be similar to the sense of having equal membership in the community, which is secure, free in terms of identity and without anxiety. Indeed, Margalit and Raz are clear that "[m]embership is a matter of belonging, not of achievement."[80]For Kymlicka, the notion of secure membership and belonging serves his advocacy for multicultural citizenship. While my thesis defends that "the right to equal protection of the laws" should be understood in terms of belonging,[81] Kymlicka understands multiculturalism also in terms of belonging. If, therefore, both arguments make sense, one can wonder, whether the equal protection of the laws and multicultural citizenship fall within the same notion: substantive equality as equal belonging in a democratic society. If yes, then, equal belonging as the message of laws, as it has been argued, means both equal protection of the laws,[82] as well as, multicultural citizenship. This is true, at least, in the cases of the citizens. Kymlicka's advocacy for multicultural citizenship is an advocacy for integration, which allows also specific rights to specific groups under conditions of equality. The Preamble of the Multiculturalism Act of Canada[83] may illustrate this connection between equality, integration and belonging. The Preamble and the Act embrace cumulatively the equal protection of the laws, the right to non-discrimination, the promotion of diversity and recognition of special rights to specific groups.[84] What the

79 *Id.*
80 Margalit & Raz, *above* note 26, at 446.
81 *See* Section I, Chapter 1.
82 Kymlicka, *above* note 26, at 23.
83 Multiculturalism Act of Canada, R.S.C. 1985, c. 24 (4th Supp.).
84 The Preamble of the Multiculturalism Act of Canada provides:

> WHEREAS the Constitution of Canada provides that every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and that everyone has the freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association and guarantees those rights and freedoms equally to male and female persons;
>
> AND WHEREAS the Constitution of Canada recognizes the importance of preserving and enhancing the multicultural heritage of Canadians;
>
> AND WHEREAS the Constitution of Canada recognizes rights of the aboriginal peoples of Canada;
>
> AND WHEREAS the Constitution of Canada and the Official Languages Act provide that English and French are the official languages of Canada and neither abrogates nor derogates from any rights or privileges acquired or enjoyed with respect to any other language;
>
> AND WHEREAS the Citizenship Act provides that all Canadians, whether by birth or by choice, enjoy equal status, are entitled to the same rights, powers and privileges and are subject to the same obligations, duties and liabilities;
>
> AND WHEREAS the Canadian Human Rights Act provides that every individual should have an equal opportunity with other individuals to make the life that the individual is able and wishes to have, consistent with the duties and obligations

Multiculturalism Act of Canada promotes is in other words equal belonging to Canada. It seems that Kymlicka, Margalit, Raz and my thesis can connect and meet on a notion of equal belonging in a democratic society.

Furthermore, Kymlicka discusses the issues of whether promoting a shared civic identity requires teaching not only of shared political values or principles, but also promoting particular national or cultural identities.[85] Kymlicka stresses that what social unity requires goes beyond sharing political values or principles. He emphasizes that it is the shared identity which makes the people, especially in multinational countries, stay together. As he says,

> [s]ocial unity, then requires not only shared principles, but also a sense of shared membership. Citizens must have a sense of belonging to the same community, and a shared desire to continue to live together. Social unity, in short, requires that citizens identify their fellow citizens as one of "us." This sense of shared identity helps sustain the relationships of trust and solidarity needed for citizens to accept the results of democratic decisions, and the obligations of liberal justice (Miller 1995).[86]

Therefore, Kymlicka advocates for a sort of common national identity to create a community.[87]

of that individual as a member of society, and, in order to secure that opportunity, establishes the Canadian Human Rights Commission to redress any proscribed discrimination, including discrimination on the basis of race, national or ethnic origin or colour;

AND WHEREAS Canada is a party to the International Convention on the Elimination of All Forms of Racial Discrimination, which Convention recognizes that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination, and to the International Covenant on Civil and Political Rights, which Covenant provides that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion or to use their own language;

AND WHEREAS the Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism designed to preserve and enhance the multicultural heritage of Canadians while working to achieve the equality of all Canadians in the economic, social, cultural and political life of Canada;

Id. at pmbl.

85 Will Kymlicka, *Education for Citizenship* at 17–20 (1997).

86 *Id*. at 18.

87 *Id*. As Kymlicka explains: "[w]hat then makes citizens in a liberal state feel that they belong together, that they are members of the same nation? The answer typically involves a sense of shared history, and a common language. Citizens share a sense of belonging to a particular historical society because they share a language and history; they participate in common social and political institutions which are based on this shared language, and which manifest and perpetuate this shared history; and they see their life-choices as bound up with the survival of this society

Kymlicka's insights seem to be in line with the suggestion that belonging to a certain body of people is essentially what membership means.[88] You belong somewhere when you are a member of it. Belonging is another way to refer to the relationships of the co-members and the good from the existence of a shared community. Trust and solidarity are elements which have been seen by Kymlicka as indispensable in a liberal democratic society. They are indeed essential elements for the democratic belonging.

Integration seems to be required from the equal membership and citizenship. But what is equal membership in a society rather than equal belonging to this State? If one understands citizenship as requiring the values of "respect, responsibility and participation,"[89] then integration gets its meaning through the above values. To be an equal member of the society, one should have such a place in the society and belong in such a way as to be equally respected, bear equal responsibilities and equally participate in the certain society. As Karst also points out, "the central issue raised by segregation was one of place – the place of blacks in society. Did black people belong to the community as equal citizens, or were they to continue to be stigmatized as inferior?"[90]

Belonging and integration have a spatial aspect, which is central to their meaning. Belonging, but where? Belonging, but how? These questions need an answer with spatial references. Integration also refers to a place. It refers to a picture of a place which is integrated. This place is in some degree and somehow united as to be a whole. Instead, a place with superior and inferior classes of people is inherently segregated. Karst is right to see *Brown*, which overruled the doctrine of "separate but equal," sending the message of who belongs to America.[91]

As the discussion is about a place for people, to say that the place is integrated or segregated, it necessarily means that the discussion is about the relationships among these people. If you are stigmatized, you cannot enjoy a relationship among equals. The person who is stigmatizing necessarily feels superior. Otherwise, one cannot stigmatize another person. Then, the stigmatized person necessarily cannot feel having a belonging in a community of equals. The relationship is then necessarily one of superiority and subordination. The relationship takes such character the persons who are parts of the relationship, influenced by the structure they operate within, give to this

and its institutions into the indefinite future. Citizens can share a national identity in this sense, and yet share very little in terms of ethnicity, religion, or conceptions of the good." *Id.*

88 I will come back at the definition of "community" in Chapter 7.

89 Karst,*above* note 4, at 76.

90 *Id.* at 76–77.

91 *Id. at* 184. As Karst says, "[t]he *Brown* decision recognized that the only vision of America capable of being shared by us all is a vision in which all of us belong." *Id.* Further, "[a]s an effort to redefine a community, *Brown II* was a failure. On the tenth anniversary of Brown I in 1964, just over 2 percent of black children in the eleven southern states were attending desegregated schools." *Id.* at 235.

relationship. Their feelings, thoughts and actions and the structure within this relationship is built constitute their relationship.

Karst finds that "citizenship is belonging."[92] He finds "belonging" to be a synonym to "participation."[93] He finally finds that the very idea of citizenship implies some measure of equality.[94] For him, "citizenship is more than autonomy and more than participation in public decisions."[95] He emphasizes, like Kymlicka, the need to have the sense and the feeling of security in the society. In particular, he finds that to be "a part of a network of relationship" one needs to find security in connection. He emphasizes the feeling of security in connection, the need for a common identity, a common program of action and a system of belief "founded more on feeling than on logic."[96] As he says, "[t]o define oneself as part of a network of relationship is to find security in connection and to see a major source of aggression in separation and unchecked competition."[97] When Karst talks about citizenship, understood as belonging and connection, he talks about integration. But all his advocacy in his book *Belonging to America* is about his proposed principle of equal citizenship. One can see that at least for the case of the citizens this is a way to belong as equals in a democratic society.

When Karst talks about "network of relationships" we are reminded of Dr King and Martha Minow who talked about "community of relationships." Martin Luther King's dream was about integration and belonging. Minow recalls Dr King's understanding of integration:

> integration involves the creation of a community of relationships among people who view one another as valuable, who take pride in one another's contributions and who know that commonalities and synergies outweigh any extra efforts that bridging differences may require.[98]

It is only under the conditions described above that a relationship can be constructed in such a way as to provide a sense of belonging in a community of

92 *Id.* at 36, 231.
93 *Id.* at 36 (stating that "citizenship is participation; citizenship is belonging.").
94 Karst, *above* note 4, at 34. at 34. Karst also explains that "[w]hen we look closely at what is supposed to be special, it turns out to be an ideology, one of 'those explicit systems of general beliefs that give large bodies of people a common identity and purpose, a common program of action and a standard of self-criticism.' …The ideological component of the American civic culture performs its unifying function in the way that myth and religion unify, providing the focus for individual self-identification in a system of belief that is founded more on feeling than on logic." *Id.* at 31–32.
95 *Id.* at 231.
96 *Id.* at 32.
97 *Id.*
98 Martha Minow, "After *Brown*: What Would Martin Luther King Say?" 12 *Lewis & Clark L. Rev.* 599, 599 (2008).

relationships among equals. Minow has been influenced by Dr. King's dream. She describes Dr. King's vision of beloved community as follows:

> [Dr. King] summoned the vision of a "beloved community": a completely integrated society, a community of love, justice, and brotherhood. Dr. King emphasized that desegregation – eliminating racial discrimination – would only produce "a society where men are physically desegregated and spiritually segregated, where elbows are together and hearts apart."[99]

Minow uses the idea of community of relationships and the inclusive membership for the micro-society of schools too.[100] As she finds:

> [s]chools provide the intellectual and social preparation for realizing the potential of democratic self governance through "communities of relationships" whose members specify rules about themselves and about how they relate to one another, ensure the rights of each person, and advance the capacity of individuals and the collectivity for social provision and advancement. School integration – mixing students across the color line and producing a community of shared respect and inclusive membership – is crucial if students are to have the chance to learn and experience social cooperation, to build friendships with people different from themselves and their families, and to imagine an inclusive "we" that mirrors the polity.[101]

Martha Minow's work on integration in education stands as a challenge to a competitive, individualistic, hierarchical and divided student body and society. She links the notions of shared community, democracy and undoing oppression and exclusion.[102] She, then, envisages an ideal of diversity which unites the people.[103] She sees that both a physical and spiritual route are necessary to work together for social cohesion. She talks, as we have already seen, about a social cohesion in a manner beyond "a society where men are physically desegregated and spiritually segregated, where elbows are together and hearts apart."[104] Her

99 *Id.* at 602.
100 *Id.* at 639–640.
101 *Id.*
102 *Id.* at 611("Undoing racial oppression, exclusion, and violence would entail the creation of a shared community of equals-and would advance society toward the ideals of democracy and freedom not yet fully realized for anyone.").
103 Minow states that "[t]he rhetoric of diversity may go some distance toward inviting attitudes of respect and appreciation; it conveys richness and variety across equals, in contrast to the potentially divisive rhetorics of desegregation or affirmative action. Diversity should enlarge the integration ideal to be fully inclusive and could embed racial mixing in the attitude of appreciation for different backgrounds and perspectives." *Id.* at 604.
104 *Id.* at 602.

insights are thus also akin to an understanding of belonging in a democratic community of equals.

A call for integration as "an imperative of justice" and "an ideal of intergroup relations in a democratic society" is also found in the work of Elizabeth Anderson.[105] Anderson finds that, notwithstanding difficulties in the experience of integration,[106] integration is an imperative of justice, freedom, democracy and equality.[107] Her definition and explanations of integration also serve to define belonging as "comprehensive intergroup association on terms of equality."[108] As she explains,

> [t]his requires the full inclusion and participation as equals of members of all races in all social domains, especially in the main institutions of society that define its opportunities for recognition, educational and economic advancement, access to public goods, and political influence."[109]
>
> […]
>
> The ideal of integration envisions a restructuring of intergroup relations, from alienation, anxiety, awkwardness, and hostility to relaxed, competent civil association and even intimacy; from domination and subordination to cooperation as equals.[110]

For Anderson, integration is in contrast with the idea of desegregation, color blindness and assimilation,[111] and it takes place in four stages;[112] (1) formal desegregation; (2) spatial integration; (3) formal social integration, and (4) informal social integration. She calls them stages of integration, because, as she says, "they reflect the typical temporal order in which a society moves from segregation to full integration."[113] Each stage is a way to dismantle different injustices[114] and are also steps towards the realization of the belonging to a community of equals.

Anderson, analyzing the forms and the consequences of segregation, shares the view that segregation can refer to processes or conditions and that there

105 *See generally* Elizabeth Anderson, *The Imperative of Integration* (2010). As she also explains, "[i]f racial segregation is the problem, it stands to reason that racial integration is the remedy. Since the problem is an injustice, the remedy is an imperative of justice." *Id.* at 112.

106 *See generally id.* at 112–134 (examining various integrative policies and considering whether their indented effects have been brought about); 180–183 (discussing the unintended side-effects of integration).

107 *Id.* at 180–191.

108 *Id.* at 112.

109 *Id.*

110 *Id.* at 117.

111 *Id.* at 113.

112 *Id.* at 113, 116; *see also id.* at 67–88 (evaluating of the causes of racial segregation tracing them to unjust anti-Black intergroup processes).

113 *Id.* at 116.

114 *See id.* at 134 (explaining what kind of injustice every stage remedies).

may be both spatial and role segregation.[115] Integration is seen as the negation of segregation,[116] with the latter having two faces.[117] As she sees it, the two faces of segregation are the following:

> (1) structures and norms of spatial and social separation, to prevent contact between members of different groups, and
>
> (2) hierarchical role segregation, to ensure that where contact occurs, it is on terms of domination and subordination.[118]

Belonging to a community of equals can be also seen as a negation of segregation. The two above faces of segregation can be also seen as faces of non-belonging in a community of equals. Therefore, it can be said, in analogy, that there are two faces of non-belonging: a spatial and a role of non-belonging. Belonging thus remedies non-belonging, in whatever form this stands. As Anderson points out, "[i]f racial segregation is the problem, it stands to reason that racial integration is the remedy. Since the problem is an injustice, the remedy is an imperative of justice."[119]

Answering the question of "[w]hen segregation leads to inequality," Anderson states that it is "[w]hen the group practicing social closure controls the allocation of goods critical to securing power or advantage."[120] Thus, for Anderson, the heart of the inequality problem is the unequal allocation of the goods – an allocation of unequal power and advantages – which allows the creation of relationships of domination and subordination. This is also the essence of non-belonging in a community of equals, through segregation. The lack of access to allocation of such goods, which are critical to secure power or advantage, is a form of non-belonging in a community of equals. In this sense, segregation in education deprives the people of all goods that an integrated micro-society can provide. In a segregated society even the best integrated educational institution cannot serve as a micro-society of an integrated larger society. The students are deprived of the good of preparation as members in an integrated larger society.

Dr. King, Kymlicka, Karst, Anderson and Minow call for working on integration and interracial and intercultural relationships. I share their understanding of and a call for integration. Their work can be understood to be about belonging in a democratic society. As Anderson said "to live together is a learning process."[121] To see it and experience it as a process and namely, a

115 *Id.* at 112 (adopting Tilly's view).
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.* at 10.
121 *Id.* at 182–183 (pointing out that "the issue is not whether racial conflict increases in more integrated settings. It is rather whether integration, over time, enables people to learn better ways of interacting across racial lines."). She goes on to add

process of learning, is to see a message of hope that "change can come."[122] As in every learning process, the beginning may be difficult. However, as in every other process of learning, through the learning process itself and sincere efforts to learn the progress and change come. Such a description is also a realistic description of the process of belonging in a democratic society. Here again, it is also a message of hope that if we want to learn how to belong in a democratic community of equals, we can achieve it.

Integration can be therefore understood in terms of belonging. Belonging has been shown in this context, as in the analysis of "the right to equal protection of the laws," to mean membership. What is not yet certain in this introduction is what exact type of belonging integration means. It has been indicated that integration means equal belonging in a democratic society. However, the terms equal belonging and democratic society need to be analyzed more. This is done gradually in the next chapters. The reader can however already see, at least, that the general hypothesis that the definition of integration as equal belonging in a democratic society is plausible.

Concluding Comment

The first concluding comment of this chapter is that both "the right to equal protection of the laws" and the ideal of integration can be understood and interpreted in terms of belonging. Next, I posit that belonging means membership. It has to do with the participation of a member in a certain group and relationships. Thirdly, there are two plausible hypotheses about the nature of belonging which both the ideal of integration and "the right to equal protection of the laws," understood in a substantive way, promote. It has been argued that both the equal protection of the laws and the idea of integration may mean a right to equal belonging in a democratic society. And finally, I proffer another plausible hypothesis. It may be that "the right to equal protection of the laws" and the idea of integration have in some contexts the same meaning: the *Right to Equal Belonging in a Democratic Society*. Thus, it may

> "[i]f the integrational argument is right, then integration in settings of institutionalized support for cooperation initially increases both negative and positive interacial interaction. Over time people will learn to better manage interracial relationships. Increased competence in interracial interaction will increase the returns to such interaction, and thereby induce people to choose more integrated lives. Studies consistently confirm the integrationist hypothesis. Students who attend more racially integrated schools lead more racially integrated lives after graduation: they have more racially diverse coworkers, neighbors, and friends than do students who attend less diverse schools. (6.2, 6.3)." *Id.* at 183. As she further explains, "[t]he task before us, is to move beyond fitful episodes of integration to a sustained culture of integration, in which all citizens take for granted that all institutions of civil society, including elite offices, will be integrated, and in which their interactions are governed by shared norms of mutual respect forged together." *Id.* at 111.

122 Sam Cooke, "A Change is Gonna Come" (1964).

be that integration is an expression of "the right to equal protection of the laws" or, in other words, it may be that "the right to equal protection of the laws" includes in some contexts the idea of integration.

However, the terms "equal belonging" and "democratic society" require further exploration. I will explain in the next chapters the *Right to Democratic Belonging* or, in other words, the *Right to Equal Belonging in a Democratic Society*. I define the "democratic society" in Chapter 2. In the same chapter, I will also make clear the definition of "community of equals." I define "equal belonging" in Chapters 3–5, arguing that equal belonging means secure, "free-identity" and comfortable belonging in a community of equals.

Before the reader turns the page, she or he may have already seen that there is, at a minimum, a link between "the right to equal protection of the laws" and the ideal of integration, when both are understood in terms of belonging. I hope that the reader has been convinced that "the right to equal protection of the laws" and the ideal of integration can indeed be understood, in terms of belonging. It remains to be seen, under the explanations of the next chapters, if on the one hand integration in a larger society or other microsocieties and, on the other hand, "the right to equal protection of the laws" mean, at least some times, a right to the same type of belonging.

2 Democratic Society

Introduction

So far, the right to equal protection of the laws has been understood generally in terms of belonging in a society. This society should be a democratic society. The right is therefore understood as *the Right to Equal Belonging in a Democratic Society*. I need first to say what I mean by the term the democratic society as this is the frame of the definition, but also the democratic redefinition of the right in the sense of the reasonable limits of the right in a democratic society. The *right to equal belonging* will be defined in more specific terms in Chapters 3–5. I will now provide a definition of "the democratic society" within which the right can be further redefined or even, in a time of emergencytimes be violated. It is suggested that "the democratic society" should be understood as "a participatory community of equals." The fate of these three involved notions – participation, community, equality – are intertwined with democracy.

I. Community

To achieve belonging in a community we need first to build this particular community to belong to. This community is our relationship, or, in Dr. King and Minow's words, "the community of relationships"[1] we build with the other members of those relationships. The community is certainly not a mere coexistence of people.[2] It is not only physical, but it is somehow also spiritual.[3]

1 Martha Minow, "After *Brown*: What Would Martin Luther King Say?" 12 Lewis & Clark L. Rev. 599, 639–640 (2008) (using the idea of community of relationships and the inclusive membership for the micro-society of schools too).

2 Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 235 (1991) (stating that "[w]e can all agree that a community is not created merely by declaring its existence").

3 *See e.g., generally* Minow, *above* note 1 (where both Dr, King and Minow understand a physical and spiritual connection among the citizens); *See also id.* at 622 (stating that "[t]he focus on simple appearances does not advance this bold vision"). *See also e.g.*, Aristotle, *Politica* III 97 (introduction, translation, comments by Pinelope Tzioka-Eyaggelou, 2007) (supporting that physical proximity is not enough to make a *polis*).

Furthermore, it seems that members of the same group should agree on the character of this relationship that they are members of. To what exact relationship they belong to? We need a dream about this relationship to agree upon. This dream will inevitably promote some values. We need then a project of action to realize this dream. Then, it will be our common daily effort to make it true. In reality, the shared project of action of how to build the community is what mostly unifies the members of the community. While building a community, we become a community.

Surprisingly, the notion of "the community of equals" stems from Aristotle. One can start navigating through Aristotle's teachings, making first clear that no one can praise Aristotle for being liberal in the contemporary sense. Indeed, he did not challenge, but he accepted the status quo of his time of the existence of slavery and the exclusion of women and male immigrants from participation in the administration and management of *polis*. Aristotle was teaching about a community among the citizens of *polis*, or in other words, the *demos*. He did not however challenge the exclusive nature of this citizenship. Still, with these caveats in mind, one can benefit from Aristotelian insights of the meaning of being a citizen in a *polis* which has diversity, "equality" and "unity" in the restricted form the exclusive Athenian citizenship could offer. Contemporary scholars can benefit from these insights bearing in mind two conditions: they should read Aristotle in the context of Aristotle's own time. In addition, they need to have a sincere purpose in receiving contemporary lessons. They can, then, translate Aristotelian teachings through a contextual process and see what his teachings can mean in our times for what a community of equals should be. Having said that, the reader can now set aside the counterargument that Aristotle confirmed the exclusion of women, slaves and male immigrants from participating in the management of the *polis*. Only then, can the contemporary scholar be dedicated to finding any potential contemporary lessons in Aristotle's teachings. Being committed to meet the above two conditions, I will now attempt to benefit from Aristotelian teachings without exhaustively presenting the entire Aristotelian theory.

For Aristotle, the existence of the *polis* does not simply require cohabitation at the same place. For him "since the *polis* belongs to the compound things, it is a wholeness which is composed of many parts. The *polis* is composed of the plurality of the citizens."[4] He, at this point, states that "in any case, the state organization exists as a society (κοινωνία)."[5] The Greek word for society, that is "κοινωνία," can be also translated in English as "participation."[6]

4 *Id*. at 83.

5 *Id*.

6 A further translations of the Greek word for society, "koinwnia" (κοινωνία), may be communion and a related translation could be "community." In fact, in Greek the municipality is called "demos," while the smaller municipality/village is called "community." Furthermore, the word "koinwnia" (κοινωνία) in religious rituals is translated in English as "communion." The English word "society" also has its roots to the verb "to be associated with."

He goes on to discuss what kind of criteria are required to consider a group of people as a unified one as to constitute a *polis*. The first criterion is the ability to participate in the management of the *polis*. This is, in other words, a criterion of having the power for such participation. Let's name this criterion as "the participatory Aristotelian criterion." This is a substantive and contextual criterion. It is based on the context and the reality that one can judge whether there is the ability for participation.

The second criterion required to consider a group of people as a unified one as to constitute a *polis* is to have relationships with the aim of having a life in the city with well being and human dignity. Let's name this criterion "the psychological and relational democratic Aristotelian criterion." For Aristotle, society arises from a sort of "alliance" among the people.[7] For this reason, he sees that marriages between people of a certain society is one of the particular ways of achieving the social unity of the *polis*.[8] For Aristotle, the *polis* is the relationships of the coexistence of families and generations with the aim of wellbeing ("ευ ζην"), in order to achieve a perfect and self sufficient life within the *polis*.[9] One can perhaps understand that Dr. King and Minow's understanding of "community of relationships" is close to what Aristotle meant by saying that the *polis* is composed of relationships. This is to live with wellbeing and human dignity (ευδαιμονία και αξιοπρέπεια).[10] Aristotle explains that the final aim of the *polis* is well-being of its members.[11] Therefore, Aristotle emphasizes the element of the relationships among the citizens and their integration, which can provide the perfect life in wellbeing and human dignity within the *polis*. One can reflect on this second purposive criterion *a contrario*; having relationships of superiority and dominance does not fall within the range of relationships in wellbeing and human dignity.

The criteria of the ability of the citizen to participate in the city and the relationships of wellbeing and dignity are the two positive aspects for what the unified city means to Aristotle. Thus, Aristotle excludes the criterion of the mere territorial physical definition, as a criterion to consider a territorial unity as a *polis*. The borders through mere "walls"[12] do not necessarily define a *polis*. A territory with physical unity should satisfy the two positive criteria to be recognized as a *polis* or, in other words, a *demos*.

Kymlicka finds that in a multinational state it is the shared identity which is the basis of social unity. He rejects the view that shared values are sufficient for social unity[13] and instead finds that the "missing ingredient seems to be the

7 Aristotle,*above* note 3, at III 137.
8 *Id*. at 139.
9 *Id*. (with self sufficiency not in the individualistic sense, but rather in the sense that people within the community achieve the self sufficiency within and through this community.)
10 *Id*.
11 *Id*.
12 *Id*. at 97.
13 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 187–188 (1995) (providing the examples shared values between Quebecois and the

idea of a shared identity."[14] He understands that the basis of such shared identity is the "pride in certain historical achievements."[15] He does acknowledge that "in many multination countries, history is a source of resentment and division between national groups."[16] Kymlicka appeals to Charles Taylor's suggestion for "deep diversity" and he finds that,

> if there is a viable way to promote a sense of solidarity and common purpose in a multination state, it will involve accommodating, rather than subordinating, national identities. People from different national groups will only share an allegiance to the larger polity if they see it as the context within which their national identity is nurtured, rather than subordinated.[17]

Therefore, Kymlicka and Taylor see that identity non-subordination is a source of social unity. This identity non-subordination may enhance the understanding of the "psychological and relational democratic criterion" I have seen in Aristotle's teachings.

Similarly, Minow's understanding of racial integration goes beyond mere racial mixing[18] and "simple appearances."[19] Instead, she focuses on the relationships of the people and her vision of promoting Dr. King's vision of integration. This is a vision of a "constructive equality of oneness into a community of love, justice, and brotherhood, recognizing the human dignity, individual rights and interdependence of each person."[20] I would say that for Minow the criterion of community is based on the *quality* of the relationships the community is composed of. This reveals a form of psychological criterion in Minow and Dr. King's insights.

One can understand that both Dr. King and Minow are calling for a united society, both physically and spiritually. Their vision of a society is, in other words, a society where the bonds of the people are strong and real, so as to render this society "a community of equals." They both deal with the hearts and minds of the people in a society and, consequently, with the relationships among the members of that society. It seems that they see equality being achieved through a physical, as well as, a spiritual route of sharing and respect among the members of the community. For me, their vision is in line

rest of Canadians; the Flemish and French-speaking Belgians; the citizens of Norway and Sweden; the Danes, Germans, French and British).

14 *Id.* at 188.
15 *Id.* at 189.
16 *Id.*
17 *Id.*
18 Martha Minow, *In Brown's Wake: Legacies of America's Educational Landmark* 8 (2010). She goes on to report that "School enrolments are, in fact, more segregated in 2000 than they were in 1970." *Id.* at 9.
19 Minow, *above* note 1, at 622.
20 Minow, *above* note 18, at 8 and her notes 17 and 18.

with a vision of a secure, "free-identity" and minimum comfortable belonging to a community of equals.

To belong to a community, one needs to have loyalty to this community. To belong to a specific group with people with whom you share some particular values and attitudes, while some other groups in the same larger society do not, means that you belong to a smaller community. This belongingness can enhance or demean the belonging to the larger community of society as a whole. The priority one gives to the loyalty to each group and the nature of the belonging to the little community is crucial for creating loyalties, which may enhance or instead demean the belonging in the larger society. This is, however, a complex issue and each case may be different.

But the difficult issue that multicultural and multinational countries seem to face is the competing loyalties of the individuals. The precise idea that one believes in and is loyal to provide the essence of the national identity. Consequently, this matters for social fragmentation or unity. The patriotic symbols, indeed, convey a message of belonging.[21] Still, the symbols themselves are not enough to provide the experience of a life together in and as a community.

As Karst says about his own country, "[p]art of the explanation for the heightened sense of American identity is a widely shared belief in equal citizenship as a cluster of values and as a social fact."[22] It seems that what makes up "the community of equals" is the sense of equal membership, or in other words, the sense of equal belonging.

Community cannot be built without a minimum of trusting public relationships. Discussing post-conflict situations, Watts notes about the lack of trust:

> [t]he lack of trust and accommodation and of an acceptance of the rule of law and constitutionality has made it difficult to obtain agreement on federal solutions or to operate federal institutions that require an emphasis upon trust, accommodation and constitutionality. Where these requisites for an effective federation are lacking, the challenge is how to achieve them in the atmosphere of distrust and hostility aroused by the preceding conflict. All too often insufficient attention has been given to the need to establish the necessary conditions. The dilemma is how these conditions are to be created in situations that are already permeated by the antagonisms aroused by conflict.[23]

Community seems to be composed of trusting relationships. Relationships of distrust can not build a community.

21 Karst, *above* note 2, at 183.

22 *Id*. at 181.He goes on to say, "[b]ut membership in the national community helps to provide a sense of wholeness, not only for the society but also for the citizen's sense of self. No one's whole personality is captured by the label American; yet the nation is the one group membership, the one identity, that purports to contain nearly all the others." *Id*. at 184.

23 Ronald L. Watts, *Comparing Federal Systems* 188 (2008).

For Montesquieu, equality and the love for the homeland is the virtue needed in democracy. He emphasizes that it should be an additional spring in a popular state.[24] What Montesquieu calls political virtue is "love of the homeland, that is, love of equality."[25] Love of the republic in a democracy is love of democracy; love of democracy is love of equality.[26] Love for equal belonging in a democratic society is, I think, the foundation upon which a society can be built as "a community of equals." To build "a community," one needs to build necessarily "a community of equals." And because community seems to be composed of trusting relationships, trust is also necessary for belonging in "a community of equals." It follows that for "a community of equals" to be built, both a physical and psychological proximity among the equals should exist.

II. Participatory

No one can be a member of a community if she/he does not participate in this community. To belong in a community means that you participate in this community. For Aristotle, citizen, is whoever participates in the power[27] and mainly whoever participates in the political offices.[28] Therefore, the citizens are members of the city because they are empowered to participate and be

24 Montesquieu, *The Spirit of the Laws* (tr. Anne M. Cohler et al., 1989), Book 3, Ch. 3, at 22.

25 *Id.* at Author's foreword. He also says: "[v]irtue, in a republic, is a very simple thing: it is love of the republic; it is a feeling and not a result of knowledge; the lowest man in the state, like the first, can have this feeling. Once the people have good maxims, they adhere to them longer than do those who are called *honnetes gens*. Corruption seldom begins with the people; from their middling enlightenment they have often derived a stronger attachment to that which is established.

Love of the homeland leads to goodness in mores, and goodness in mores leads to love of the homeland. The less we can satisfy our particular passions, the more we give ourselves up to passions for the general order. Why do monks so love their order? Their love comes from the same thing that makes their order intolerable to them. Their rule deprives them of everything upon which ordinary passions rest; what remains, therefore, is the passion for the very rule that afflicts them. The more austere it is, that is, the more it curtails their inclinations, the more force it gives to those that remain." *Id.*, Book 5, Ch. 2, under the title "What virtue is in the political state" at 42–43.

26 *Id.* at 43.

27 Aristotle,*above* note 3, at 95. *See* for more insights of who is the citizen at 85–100.

28 *Id.* at 117. He goes on to refer to Homer who points out the difference between the immigrant and the citizen in his poem saying "like being an immigrant without any political office." The acceptance by Aristotle of the illiberal views of his time on the immigrants are beyond question. The point to be made here for the contemporary scholar is however the emphasis by Aristotle of the fact that the notion of empowerment to participate in the management of the state is inherent and sine qua non element of the notion of citizenship. Therefore, one can understand that according to Aristotle, the citizens should be empowered to participate in the management of the city.

involved in the management of the city. Consequently, it stands to reason that if such empowerment does not exist, one can not be considered a citizen. For belonging in a true democratic community, the community should be necessarily participatory in substantive terms. What matters is the real relationship and proximity of the citizens to the decision-making process when the outcomes affect them. What matters is therefore how much all the affected parties have the power to influence the substantive outcomes in the political process.[29]

On this point, the Supreme Court of Canada in *Reference re Secession of Quebec*[30] has been very insightful. The Court provided an opinion about the legality of the unilateral secession of Quebec from Canada. It gathers together substantive standards that a democratic decision should meet and connects those standards with the idea of participation and equal membership; dignity, social justice and equality; accommodation of religious and cultural groups and respect for their identity; faith in social and political institutions.[31] In other words, I would say, that for the Supreme Court of Canada, all of the above substantive standards constitute substantive elements, which enhance the right to effective participation. Effective participation is a constituent part of *the right to equal belonging*.

Furthermore, the Supreme Court of Canada highlights the significance of a "continuous process of discussion" required by a "functioning democracy."[32] The Court emphasizes the value of the interplay of ideas through deliberation, compromise and negotiation.[33] It also stresses that "[n]o one has a monopoly on truth."[34] In presenting a system that contemplates that "in the marketplace of ideas, the best solutions to public problems will rise to the top," the Court acknowledges the inevitable fact of the dissenting voices.[35] It states that "[a] democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by

29 *See, e.g.*, Reference re Secession of Quebec [1998] 2 S.C.R. 217, para. 64 (Can.) (making clear that democracy is not restricted to a procedural standard but the substantive outcomes also matters. In particular, as the Court states, "[d]emocracy is not simply concerned with the process of government." [] "democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government."(internal quotations omitted)).

30 *Id.*

31 *See e.g., id.* (illustrating some of the substantive goals). As the Court stated, "[t]he Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society." *Id.* (quoting R. v. Oakes (1986) 1 S.C.R. 143).

32 *Id.* at para 68.

33 *Id.*

34 *Id.*

35 *Id.*

which all in the community must live."[36] Therefore, the Court is talking about a system, where the exchange of the ideas brings the best solutions and, where all have a voice and live as "a community."

The Court also emphasized the significance of the interaction of the rule of law and the consent of the governed in a free and democratic society. The consent of the governed has been seen as basic in the understanding of such society. As the Court puts it, "[t]he system must be capable of reflecting the aspirations of the people." Next to that, the Court sees the rule of law as indispensable to democracy. For the Court, the rule of law also rests on "an appeal to moral values, many of which are imbedded in our constitutional structure."[37]

But how then can we measure participation as a legal test? I suggest, as I call it, the idea of *substantive political proximity*. At its essence, the proximity of the person who brings the claim, that is the Claimant, to the decision-making center can be a legal tool for the judge to measure the substantive participation of the Claimant in the legislative/policy process from which the impugned legislation/policy has arisen. The closer the decision-making center is to the Claimant, in a substantive sense, the more the political channels should be considered open to the Claimant. The bigger the proximity to the decision-making process and center, the more the direct elements in the general representative democracy we experience and, in that way, the more we act in "micro-democracies." It is, thus, argued that the closer the Claimant is to the decision-making process and center, the stronger the contribution of this proximity to the presumption of the constitutionality of the impugned legislation. This is because in this case, the opportunity of the Claimant for an effective exercise of her/his rights in a democratic society is considered to be bigger and more real.

However the idea of proximity, while it is suggested as a legal tool, may appear to the reader too abstract to be useful at the courtroom. To make the idea clearer and more tangible, I see the application of the idea of *substantive political proximity*. I will now discuss three examples. First, the substantive political proximity can be explained in terms of substantive political accessibility. Let's say that an issue is decided by the boards of the universities and now the legislature or a referendum votes overwhelmingly for this constitutional amendment. Then imagine that race conscious admissions programs in higher education are consequently banned based on the constitutional amendment.[38] Let's say that the Claimant is a person who favors the race

36 *Id.* at para 68. The Court goes on to say that the right to initiate constitutional change on each participant in Confederation, provided by the *Constitution Act, 1982*, "imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions, in order to acknowledge and address democratic expressions of a desire for change in other provinces." *Id.* at para. 69.

37 *Id.* at 67.

38 This was the issues in Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) 134 S. Ct. 1623 (2014).

conscious admissions programs as a form of equality. After the constitutional amendment, the political process is less accessible to her/him. To lobby for her/his ideas, she/he now needs to go to the Parliament, rather than to the board of the university. The language used at the Parliament,[39] the rules of standing before the parliamentary committees,[40] the procedures before these committees,[41] the costs for campaigns[42] make the new procedure for political participation less accessible to this Claimant, than it was before the constitutional amendment. And, as Sotomayor, J., said in *Schuette*, amending the constitution especially in race sensitive issues is an "onerous task."[43]

Let's continue the previous scenario and look now the idea of "substantive political proximity" in terms of an inequality. In our example, following the constitutional amendment, there is an inequality of proximity between two kinds of affirmative action programs for admissions to the university; on the one hand, the race conscious measures and on the other hand, the affirmative action programs for the children of alumni. Many of the application forms for admissions to institutions of higher education ask whether the applicant is a child of alumni.[44] Assume now that this is the situation and this is a program, which the board of the university manages. After the constitutional amendment, the person who advocates for race conscious measures in a certain university will need greater efforts to convince for their ideas than the alumni of the same university. While the first needs to convince the members of the board of the college, the second needs to convince the members of the Parliament.

Sotomayor, J., advances a similar argument in her dissenting opinion in *Schuette*.[45] In *Shuette*, the constitutional question was whether a provision in a state constitution which bans race conscious affirmative action programs for the admissions to the institutions of higher education violates the equal

39 Think that the language to amend a legal document is necessarily a legal one. However, not all the people have legal education and/or lobbying and/or rhetoric capabilities and/or the money to pay a powerful lawyer to increase their possibilities to influence the political outcome.

40 Think that even if some people enter the room of the meetings of the Parliamentary Committees, the standing rules before the Committees may hinder their participation. The political, economic and rhetoric power of these people or her/his accompanying lawyer may also hinder or increase [the effectiveness of] their participation.

41 *See, e.g., Schuette*, 134 S. Ct. 1623 (2014), at 1660 (internal quotations omitted and stating that, "[t]he boards have the 'power to enact ordinances, by-laws and regulations for the government of the university' … They are 'constitutional corporation[s] of independent authority, which, within the scope of [their] functions, [are] co-ordinate with and equal to … the legislature).'"

42 Lobbying presupposes campaigns and consequently costs.

43 *Schuette*, 134 S. Ct. 1623 (2014), at 1662.

44 Even if this is not the case of a certain explicit affirmative action program, the applicant can always mention this in her/his personal statement.

45 Schuette, 134 S. Ct. 1623 (2014), at 1651.

protection clause, under the Fourteenth Amendment of the Constitution of the United States. The Court held that the equal protection clause does not prohibit such a banning provision in the state constitution.

Sotomayor, J., explains the inequality of creating two different process for admissions policies in educational institutions; one for the race sensitive and the other, for the rest of the admissions policies.[46] In particular, she states that "it establishes a distinct and more burdensome political process for the minority members" to advocate race conscious admissions plans.[47] As she said:

> [w]hile substantially less grueling paths remain open to those advocating for any other admissions policies, a constitutional amendment is the only avenue by which race-sensitive admissions policies may be obtained. The effect of §26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy.[48]

This new arrangement after the constitutional amendment may result in a perpetuation or even worsening of a pre-existing disadvantage. For instance, this will be the case if the Claimant is of color in the United States and the first or one of the few members of his family with higher education degree. Therefore, the have-nots get less while the haves get more, and this is the foundation of the unequal belonging in society.

A third example of the application of substantive proximity can be seen "in terms of expertise" on the particular issue of the legislation. The participation of all interested parties contributes to the expertise of the decision-makers to assess a situation these parties experience. The expertise is stronger, when the decision-making center is closer to the situation at stake, and the participation of the interested parties is stronger when the decision-maker knows what is really at stake and how people are affected. Therefore, in this idea, participation of the interested parties and expertise of the decision-making body mutually enhance each other. Then, they both enhance trust in the political system and consequently the presumption of constitutionality.

This idea of proximity in terms of expertise also finds support in Sotomayor, J.,'s dissenting opinion in *Schuette*. She very clearly supports the model of colleges and universities as decision-makers in prioritizing the goal of diversity and the manner to reach their goal. As she states,

46 *Id*. at 1661 (stating that "[a]fter §26, the boards retain plenary authority over all admissions criteria *except* for race-sensitive admissions policies.").
47 *Id*. at 1673.
48 *Id*. at 1662.

> [t]hey must be free to immerse their students in a multiracial environment that fosters frequent and meaningful interactions with students of other races, and thereby pushes such students to transcend any assumptions they may hold on the basis of skin color. Without race-sensitive admissions policies, this might well be impossible. The statistics I have described make that fact glaringly obvious.[49]

Therefore, once again, she finds that the decision-making of the issue of the race sensitive admission policies is more appropriately engaged at the level of the university and not the higher level of the constitutional amendment. She finds that these bodies are "well suited to make that decision" and she explains why "boards engaged in the arguments on both sides of a matter, which deliberate and then make and refine 'considered judgment[s]' about racial diversity and admissions policies."[50] Her explanations relate to democracy, inequality and expertise. She actually supports that the boards of universities are better situated to decide. This is because the debate there with the interested parties is easier and more direct, consequently permitting better knowledge of the situation. She finds that the universities are then in a better position to know, assess and decide the policy priorities for their educational institution. Therefore, the expertise of the decision-makers is enhanced by the participation of the directly affected people in the decision-making process. It is the people who are directly affected who know better the problem at stake, as they live it.

The three ideas of accessibility, equality and expertise discussed as applications of the idea of *substantive political proximity* are also linked to the trust in the political system. I have already discussed trust as a part of *the right to secure belonging in a community of equals*.[51] And in turn, the relationship of the representative and the represented in the political system should be based on trust. I see that this as a relationship which is based on an unwritten *Power of Attorney*. The analytical insights of this *Power of Attorney*, in Chapter 3, are complementary to the explanations of the idea of *political substantive proximity* that I have just explained. We will see them in Chapter 3 under the heading "Representativeness."

The reader has seen that the analysis of the participation took place in two stages of the suggested theory. First, the analysis of the legal conception of participation will be discussed in Chapter 3, which analyzes *the right to secure belonging in a community of equals*. It will there be analyzed as a part of the absence of systemic political disadvantage and the perpetuation and/or worsening of the pre-existing political disadvantage. Second, the analysis of the legal conception of participation takes also place in the analysis over whether

49 *Id*. at 1682–1683.
50 *Id*. at 1661, n. 5. (citing *Grutter*, 539 U. S., at 387 (Kennedy, J., dissenting))
51 *See also* Section I of this chapter (supporting that trust affects the formulation of community).

the limits of the right are justified in a democratic society. The notion of participation has been analyzed here as a part of the notion of "the democratic society." Indeed, the legal conception of participation is suggested as a criterion both for the definition of the scope of *the Right to Equal Belonging in a Democratic Society*, as well as, the justification of the limits of *the Right to Democratic Belonging*. This is not striking at all. Participation is at the heart of the conception of democracy. Rights are provided with content, their *raison d'être*, but, also limits in a democratic society. The rights of people being situated in this particular society accept also their limits in the particular case. The reader should see the insights of the meaning of participation, given in Chapter 3 and the current chapter, as complementary. However, the reader should keep in mind that all these insights function in two different analytical stages. Chapter 3 presents their function to contribute to the definition of the *Right to Equal Belonging in a Democratic Society*. The current chapter presents their functional contribution to answer the question of what is the democratic society in which the rights generally exist and are defined, and accept their limits. Therefore, the same insights, enhancing each other, contribute to two different main analytical stages; the definition of the right and the assessment of the limits of the right in a democratic society.

III. Among Equals

Equal membership is a *sine qua non* value for a community. Members of different classes can not formulate one single community. They can not feel that they belong in the same community. They can not have the sense of equally secure, free and comfortable belonging in the same community of reference.[52] For instance, the President of a State with presidential regime can be considered as the first among equals. However, her or his public office does not make her or him a superior member of society before the law. Every member of the democratic society deserves the same respect. Every member is of equal worth and no one is superior in worth nor should one dominate any other member. Necessarily, there is no dominance among equals. If there is, then the involved people are not equals. My suggestion of the three inherent innate rights of the general *right to equal belonging*[53] are some elements which can characterize relationships among equals. They also illustrate constituent elements of the democratic society. Indeed, it seems that for a community of equals to be built, both a physical and psychological proximity among the equal members

52 *See* Will Kymlicka, *Education for Citizenship* 18 (1997). As he states, "[s]ocial unity, then requires not only shared principles, but also a sense of shared membership. Citizens must have a sense of belonging to the same community, and a shared desire to continue to live together." *See also e.g.*, Kymlicka, *above* note 13, at 187–188 (I have already made this reference while explaining the notion of community).

53 Chapters 3–5.

should exist. Equal belonging refers to the manner to measure and assess this required proximity.

For Karst,

> [e]quality and community, like law and community, are intertwined by definition. The very idea of community implies at least that members are equal in their membership, and our notions of equality are themselves derived from the standards of a community. At some deep level Americans have always understood: equality among citizens is essential to the community of meaning that defines the American nation. The important question has always been: Who belongs?[54]

Indeed, the important question is how you belong in society. The nature of your belonging illustrates your status in society. It also illustrates the character of this society.

It is also to "a community of equals" that the Supreme Court of Canada referred to in *Reference Re Seccession*.[55] It concluded that the legitimacy of the system depends on the interaction between the rule of law and the democratic principle. The Court emphasized however that, "[i]t would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values."[56]

Having had explained that democracy is "commonly understood as being a political system of majority rule," the Court felt "essential to be clear what democracy does not mean."[57] The Court explained the evolution of the Canadian democratic tradition, and then connected this evolution with the efforts for realizing "effecting representation" for those who were excluded from participation.[58] It is clear that the conception of democracy the Supreme Court of Canada is talking about is not one which is restricted to the rule of the politically most powerful people. Indeed, the outcome of the will of the politically most powerful people is not, in this understanding, always democratic. Instead, there is a danger of this will being tyrannical. The outcomes should also meet the standards of some moral values, which may be part of a written or unwritten constitution. If the majority rule was the entire body of our constitutional values, then slavery, Black Codes, segregation in the United States, and apartheid in South Africa could have been considered constitutional for a longer time. I hope that we get a universal constitutional lesson from these injustices of what democracy does not mean. The Supreme Court of

54 Karst, *above* note 2, at 196.
55 Reference re Secession of Quebec (1998) 2 S.C.R. 217 (Can.)
56 *Id.* at para. 67.
57 *Id.* at para. 63.
58 *Id.* The Court goes on to stress the following:"[s]ince Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system – such as women, minorities, and aboriginal peoples – have continued, with some success, to the present day." *Id.*

Canada is clear when it professes that the will of the majority does not necessarily constitute a democracy.

It seems that "justice is equality of worth" and "injustice is an arbitrary inequality of worth among equals." People are of equal worth, and in this sense, they are equals in terms of worth. In the reality of inequality of *Goods of Reference* among equals in worth, we need such equality of goods to correspond to equality of worth of the people. Only then, can we have justice. Inequality in the enjoyment of certain goods may lead to *de facto* and arbitrary inequality in worth. Therefore, remedying an inequality of certain goods, we come closer to equality and justice. Education seems to be one of these goods. Instead, perpetuating and/or even worsening a pre-existing disadvantage or allowing a systemic political disadvantage, we deepen inequality and injustice as we create a bigger risk of dominance and unequal belonging for already vulnerable people. It is for this simple reason that the protection of disadvantaged people triggers a special role for the judge. *The Right to Equal Belonging in a Democratic Society* is suggested that it shows the required amount of equality for being equal member in a community, like a democratic society and/or a democratic microsociety such as an educational institution. My reasoning sounds somehow mathematical. It is and it can be illustrated as follows:

Because

"justice is equality of worth among equals in worth" = "injustice is inequality of worth among equals in worth"

+

Because there is

"inequality in the access of certain *Goods of Reference* among equals in worth" = arbitrary inequality of worth

→ we need "such equality in the access to these goods as to guarantee equality of worth" among equals of worth

Concluding Comment

It has been suggested that the democratic society is "a participatory community of equals." Further, both judges and policymakers should have the above theoretical insights in mind during the judicial review analysis or the policy making respectively. What we mean with one of the most popular terms in policy making and judicial review, that is the "democratic society," should be agreed upon beforehand in order to assess ideas and claims in the democratic society. Upon this agreement, both judges and policymakers, each within their constitutional power, should try to see and define the scope of the *Right to Equal Belonging in a Democratic Society*. With the same considerations in mind, they should also try to see whether the limits of the scope of the right can be justified in a democratic society in the particular case.

Closing this chapter, I do acknowledge a historic misunderstanding and abuse of the concept of a "national community." Hitler used extensively the notion of national community to cultivate national arrogance. Any national

community in my theory refers to a healthy society of a certain country or nation whose members have links to each other and they feel a societal body. This does not mean that they should feel such pride which turns to be arrogance, as to feel that they are a superior body to other societal and/or national groups.

I now turn to the definition of the scope of the right and the identification of three inherent rights. This is the first analytical pillar of the analysis of the right. This will define the scope of the *Right to Equal Belonging in a Democratic Society* and provide a model of analysis while not delivering an exhaustive theory.

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Part II

The Scope of the Right to Democratic Belonging; the Right to Equal Belonging

So far, the term "belonging" has been suggested to mean "membership" in a relationship/group. This has been hopefully revealed in Chapter 1. Next, I turn to the terms "equal" and "democratic society" in defining the *Right to Equal Belonging in a Democratic Society*. Already, in Chapter 2, the reader has seen the definition of the democratic society in which this membership should exist. This part is composed of four chapters. I explain that for the belonging to be equal should be secure (Chapter 3), free in terms of identity (Chapter 4) and minimum comfortable (Chapter 5) in a community of equals. Each chapter will explain an inherent right to *the right to equal belonging*. Chapter 6 presents the grounds of distinction which are relevant in the analysis of the *Right to Democratic Belonging* – that are the *grounds of unequal belonging*. Chapters 3–6 present criteria for defining and analyzing the scope of the right.

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3 The Right to Secure Belonging in a Community of Equals

Introduction

For a belonging to be democratic, the belonging should be equal. For a belonging to be equal, the belonging must be equally secure for all the members of the group. What follows is an explanation of the kind of treatment that one expects as a minimum in a public relationship to feel secure as an equal member of this relationship.

While exploring difficult public relationships and the security needs of its members, empirical examples can explore normative theory to respond to real problems. Aboriginal people in Canada and in the United States experienced injustices regarding their land and culture from the European settlers. African-Americans experienced slavery and segregation. Both Aboriginal people and African-Americans still experience under representation in their societies.

As another example, divided countries like Cyprus fall within a set of particularly difficult cases. How can security and trust be achieved in a country which has been literally divided for 42 years? How can Turk and Greek Cypriots, who experienced the Turkish invasion in 1974 and its consequences, start living together in their country? What are the minimum guarantees will make both Turk and Greek Cypriots feel that they enjoy an equally secure belonging in their common country? It remains to be seen if and how they will find their own way to start a new project of sharing and living together in a reunified Cyprus, if this can ever become a reality. Moreover, how then can the children and the children of those children of the Aboriginal people in Canada and the United States, African-Americans, and Greek and Turk Cypriots enjoy a secure belonging in their relevant societies?

As far as *the right to secure belonging* is concerned, it is suggested that there are at least four contextual factors that the judge and policymakers should take into account to identify whether there is a violation of *the right to secure belonging in a community of equals*. These factors are:

i Absence of systemic political disadvantage;
ii Absence of prejudice;
iii Absence of stereotype;

iv Non dominance and prohibition of perpetuation and/or worsening of a pre-existing disadvantage; and
v Other disadvantages and ways of oppression which demean secure belonging to a community of equals.

These contextual factors should be analyzed in substantive terms, beyond intentions and formalities. The suggestion for these factors has been very much influenced by the test the Supreme Court of Canada applies in their analysis of equality rights, under section 15. The Supreme Court of Canada has used similar insights to identify "substantive inequality/discrimination" under section 15. The Court has started working on a substantive approach since *Andrews v Law Society of British Columbia*.[1]

I. Absence of a Systemic Political Disadvantage

If belonging means membership, then equal and democratic belonging means equal and democratic membership. And equal participation is a synonym for equal membership. One can explain security in belonging in terms of participation in the political system.

Dialogue, in precise linguistic terms, means "a process where the words go through."[2] This means that people speak and listen to each other, illustrating the process through which the solutions in a democratic society should be adopted. The voice of each member should be able to be heard and be part of a real debate. The greater participation one has as a member in the political relationships, the stronger the security one feels in this relationship. This can be translated and developed in judicial review terms in the following sense: the more secure belonging one feels in a community of equals in respect of the impugned legislation, the stronger the presumption of its constitutionality.

Many scholars have emphasized the participation in a political system. Iris Marion Young understood inclusion in democracy in terms of political communication. As she explains, "[a] theory of democratic inclusion requires an expanded conception of political communication, both in order to identify modes of internal inclusion and to provide an account of more inclusive possibilities of attending to one another in order to reach understanding."[3] Young distinguished the external and internal exclusion.[4] "External exclusion names the many ways that individuals and groups that ought to be included are purposely or inadvertently left out of fora for discussion and decision making."[5]

1 Andrews v. Law Soc'y of British Columbia, [1989] 1 S.C.R. 143 (Can.).
2 The word is a compound one composed of two Greek words; Δια [Dia] and λογος [logue]. The first component means "through" and the second can mean either "a speech" or "reason."
3 Iris Marion Young, *Inclusion and Democracy* 56 (2000).
4 *Id.* at 55.
5 *Id.* at 53–54.

External exclusion is thus explained as "the experiences that concern how people are kept outside the process of discussion and decision making."[6] Internal exclusion is explained as "experiences that concern ways that people lack effective opportunity to influence the thinking of others even when they have access to procedures of decision-making."[7] As she argues:

> [a] more complete account of modes of political communication not only remedies exclusionary tendencies in deliberative practices, but more positively describes some specific ways that communicatively democratic process can produce respect and trust, make possible understanding across structural and cultural difference, and motivate acceptance and action.[8]

Young explains the political functions of three modes of communication in addition to making arguments: greeting, rhetoric and narrative.[9] In particular, she explains that "[t]he gesture of greetings function to acknowledge relations of discursive equality and mutual respect among the parties to discussion, as well as to establish trust and forge connection based on the previous relationships among the parties."[10] For practical examples, think of photographs in the domestic and international media of leaders of political parties or leaders of different countries during negotiations of an agreement or conflict resolution. Pictures of shaking hands and dinners among the participants of the political negotiations are common.[11] Such pictures provide a message that there is or, at least, it appears that there is a basic willingness to discuss.

Furthermore, Young explains that a normative theory of discussion-based democracy should attend to the rhetorical aspects of communication. She explains that "people sometimes reject claims and arguments not on their rational merits, but because they do not like their modes of expression."[12] As she goes on to say, "[a]n inclusive communicative democracy presumes an obligation on everyone's part to listen to claims being made on the public,

6 *Id*. at 55.
7 *Id*.
8 *Id*. at 57.
9 *Id*. at 57; *see generally id*. at 57–77.
10 *Id*. at 59. *See generally id*. at 57–63 (explaining the "Greeting or Public Acknowledgment"); *see also id*. at 62 (providing the example of the moment when Yasser Arafat and Yitzak Rabin shook hands in 1993 and stating that "some wrongly celebrated this moment as the arrival of peace.").
11 For example, one can only make a casual search on the internet about "Negotiations for Cyprus" to see how many pictures between the Presidents of the Republic of Cyprus and the leaders of the Turkish Cypriot Community may find.
12 Young,*above* note 3, at 70. As she goes on to explain, "[t]hey dismiss those who do not express themselves in the 'proper' accent or grammatical structure, or who display wild and funny signs instead of write letters to the editor. One reason to bring the category of rhetoric explicitly into focus is to notice in a situation of political conflict how some people can be excluded from the public by dismissal of their style." *Id.; see also id*. at 63–70 (explaining "Affirmative Uses of Rhetoric").

however expressed, unless and until they can be demonstrated as completely lacking in respect for others, or as incoherent."[13] Young suggests that inclusive political communication acknowledges and desires to accommodate the "specificity of context and audience."[14] No one is excluded because of the style and manner of expression, as long as they are respectful to others. What matters more is the content of the ideas one advocates, expressed in a respectful to the others way.

Then, Young considers narrative as an alternative mode of communication "among members of a polity with very different experience or assumptions about what is important."[15] She identifies several ways "[p]olitical narrative furthers discussion across difference[.]"[16]

First, political narrative contributes as a "[r]esponse to the 'different.'"[17] Using the example of sexual harassment in legal theory, she presents how through narratives a problem has been "identified and named, and a social moral and legal theory about the problem has developed."[18] Second, political narrative contributes to "understanding the experience of others and countering pre-understandings."[19] In this sense, story-telling and narratives "often help target and correct" pre-understandings, which "often depend on stereotypes" and "empty generalities."[20] Third, political narratives aim at "[r]evealing the source of values, priorities, or cultural meanings."[21] In this sense, the normative starting points and premises of the arguments are understood, while "travel[ing] through overlapping narratives." It is only then that a reasoned argument can be made in pluralist polities.[22] Therefore, for Young, when people do not share a factual description of the problem, style, evidence rules of the argumentation and normative premises, narratives can still be the way to proceed to a reasonable disagreement. Thus, Young, explaining this normative

13 *Id.* at 70.
14 *Id.*
15 *Id.* at 71. As she explains: "[w]e must share a description of the problem, share an idiom in which to express alternative proposals, share rules of evidence and prediction, and share some normative principles which can serve as premises, in our arguments about what ought to be done. When all these conditions exist, then we can engage in reasonable disagreement…[]. When these conditions for meaningful argument do obtain, does this mean that we must or should resort to a mere power contest or to some other arbitrary decision procedure? I say not. Where we lack share understandings in crucial respects, sometimes forms of communication other than argument can speak across our differences to promote understanding. I take the use of narrative in political communication to be one important such mode." *Id.* at 72; *see also id.* at 70–77 (explaining "Narrative and Situated Knowledge").
16 *Id.* at 72.
17 *Id.* at 72–73.
18 *Id. at* 73.
19 *Id.*
20 *Id.* at 74.
21 *Id.* at 75.
22 *Id.* at 75–76.

function of narrative in political communication, sees that every participant can teach, learn and change.[23] In sum, Young overall argues that,

> an inclusive theory and practice of communicative democracy should not privilege specific ways of making claims and arguments. Participants in communicative democracy should listen to all modes of expression that aim to co-operate and reach solution to collective problems. One might object that such a norm of inclusion would seem to imply that no particular political communication is better than any other.[24]

John Hart Ely has suggested a democracy reinforcing judicial review theory. Ely was concerned with how to check the majority's will in order to ensure that everyone's human rights are protected.[25] However, he focused on the process of political participation and he did not enter into any assessment of the substantive outcomes.[26] His general idea is that those who can not be protected politically deserve special protection from the judiciary.[27]He suggested that the Court should apply a more rigorous standard of review, when the impugned legislation is against the interests of people who are the minority in the legislative arena, in the sense of "discrete and insular minorities."[28] Even

23 *Id.* at 77 (stating that "[n]ormative functions of narrative in political communication, then, refer to teaching and learning.").

24 *Id.* at 80.

25 John Hart Ely, *Democracy and Distrust, A Theory of Judicial Review* 8 (1980) (stating that "the majority can tyrannize the minority and that this is precisely the reason that in the Bill of Rights and elsewhere the Constitution designates certain rights of protection."). Ely goes on to state that "[t]he Constitution has instead proceeded from the quiet sensible assumption that an affective majority will not inordinately threaten its own rights and has sought to assure that such a majority not systematically treat others less well than it treats itself-by structuring decision processes at all levels to try to ensure, first that everyone's interests will be actually or virtually represented (usually both) at the point of substantive decision, and second, that the processes of individual application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory." *Id.* at 100.

26 *Id.* at 181 (stating that "the court can appropriately concern itself only with questions of participation and not with the substantive attack.").

27 *Id.* at 152. According to Ely, "[b]ut though the general idea here may be clear enough – courts should protect those who can't protect themselves politically – the justification for it isn't. …We are not all the same in all respects and on certain subjects our interests in fact do differ substantially. There is thus no way to exclude a priori as the theory as elaborated so far does – the possibility that there may exist groups or interests with which other will refuse to combine politically for perfectly respectable reasons." *Id.*

28 *Id.* at 159–160 (providing an example where there are no dangers and distrust and thus suspicious classification.) In Ely's example, "the distinction relates to two groups – optometrists and opticians – who neither of the groups being compared is one to which most of the legislators belong. Such a law – and most legislative classifications are of this "they – they" contour – may lack the special safeguard that a self-deprecating generalization seems to provide, but it also lacks the

if his theory is limited, as it focuses perhaps only on the process and he does not provide perhaps full explanation of which minorities are the "discrete and insular minorities," his theory can contribute to the argument here that absence of a systemic political disadvantage is a contextual factor for the judicial review analysis of the *right to a secure belonging in a democratic society.*

In particular, Ely explains that a more rigorous standard of judicial review is appropriate, when there is a political malfunction. A malfunction of the political system occurs when there is "stoppage" in the political channels,[29] in the following sense:

> [m]alfunction occurs when the process is undeserving of trust when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[30]

He thus explains this malfunction in terms of participation in the political system, as a process based concept. He views that while members of the majority in the legislative arena can elect new representatives if the current representatives do not satisfy their interests, the members of the minority in the legislative arena do not have the same protective mechanisms.[31] He translates

unusual dangers of self-serving dangers of self-serving generalization and is consequently correctly classified as constitutionally unsuspicious." *Id*. *See also id*. at 172 (providing another example of unsuspicious classification: "there is nothing constitutionally suspicious about a majority's discriminating against itself, but we must never relent in our vigilance lest something masquerading as that should in face be something else.")

29 *Id*. at 136 (stating that "[t]o the extent that there is a stoppage, the system is malfunctioning, and the Court should unblock it without caring how it got the way.").

30 *Id*. at 102. *See also id*. at 103 (stating "however are comparative outsiders in our governmental system, and need worry about continuance in office only very obliquely … It does however put them in a position objectively to assess claims though no one could suppose the evaluation won't be full of judgment calls – that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.").

31 *Id*. at 78 (stating that "[i]f most of us feel we are being subjected to unreasonable treatment by our representatives, we retain the ability – irrespective of whether they are formally or informally insulating themselves – to turn them out of office. What the system at least as described thus far, does not ensure is the effective protection of minorities whose interests differ from the interests of most of the rest of us. For if it is not the many who are being treated unreasonably but rather only some minority, the situation will not be so comfortably amenable to political correction. Indeed there may be political pressures to encourage our representatives

the trust and distrust/malfunction in the political system into terms of the presumption of constitutionality.[32] He understands that the majority could not be trusted to protect the interests of the minority.[33] He views the role of the judge in a democracy as the "referee," intervening only when it is necessary.[34] In the case that there is malfunction, Ely suggests that there is a suspect classification, which means prima facie case,[35] thus triggering a more rigorous judicial intervention.

Ely was correct in that the political participation of the affected parties of the impugned legislation should inform the judicial review analysis. He was correct to see that the lack of participation of the affected parties in the legislative arena, when these parties belong to the minority, is not worthy of trust and a presumption of constitutionality. Instead, it triggers a more active role for the judge in a democratic society. One hint that Ely might tried to enter in a somehow substantive analysis is his reference to prejudice.[36] In fact, one of the

to pass laws that treat the majority coalition on whose continued support they depend in one way, and one or more minorities whose backing they don't need less favorably. Even assuming that we were willing and able to give it teeth, a requirement that our representatives treat themselves as they treat most of the rest of us would be no guarantee whatever against unequal treatment for minorities.").

32 *Id.* at 117 n. 34 (referring to Chief Justice Warren who wrote for the Court in *Kramer v. Union Fee School District No.15*: "… The presumption of constitutionality and the approval given 'Rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.").

33 *Id.* at 120 (stating "[w]e cannot trust the ins to decide who stays out and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one.").

34 *Id.* at 102 (stating that "[t]he approach to constitutional adjudication recommended here is akin to what might be called an antitrust as opposed to a regulatory orientation to economic affairs – rather than dictate substantive results it intervenes only when the market, in our case the political market, is systematically malfunctioning. (A referee analogy is also not far off: the referee is to intervene only when one team is gaining unfair advantage, not because the wrong team has scored.) Our government cannot fairly be said to be malfunctioning simply because it sometimes generates outcomes with which we disagree, however strongly (and claims that it is reaching results with which the people really disagree – or would if they understood – are likely to be little more than self-deluding projections). In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office.").

35 *Id.* at 154 (stating that "suspect classification means prima facie case").

36 *Id. See also id.* at 153 (stating that "[s]witching the principal perspective thus, … Prejudice … it would be to follow that one set of classifications we should treat as suspicious are those that disadvantage groups we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure.").

criticisms of Ely's theory was that it was self-contradictory as it appealed to substantive norms as well.[37] Another interpretation may be that he talks about a process-based theory with a substantive element in this process. In any reading, Ely's theory is limited as he does not enter in a full substantive analysis of when the intensive judicial review is justified. However, Ely offers important insights which can be the starting point for a more complete, both process- and substantive-based, judicial review theory.

Patrick Monahan, in his theory for a judicial review of equality rights under section 15 proposes an effective right of equal access and participation in the political system. As he understands, "[t]he principle of equal access to the political system constitutes the background purpose of both sections 15(1) and 15(2) of the *Charter*."[38] He argues that the central focus of judicial review should be the integrity of the political process itself. As he states, the judiciary should interpret constitutional guarantees in such a way that the opportunities for public debate and collective deliberation are enhanced. As he explains, "[t]o put the matter simply, constitutional adjudication should be in the name of democracy, rather than right answers."[39] Monahan's proposal for "equal access and participation in the political process" is based on the link he sees among the notions of equality, democracy and community. He first admits that there are many different visions of democracy, and he takes into account the arguments in favor of and against representative democracy. He then refers to the Greek notion of public freedom and embraces that freedom as an active participation in the public decision-making.[40] Monahan regards "consent as the only legitimate basis for the exercise of state power" and that "either the people themselves or their accountable representatives should have responsibility for making political choices."[41]

Monahan seeks more than just formal access of citizens to the political process, and he stresses the effective exercise of the right to equal access and participation. His theory requires effectiveness beyond the intentions and motivations

37 Patrick J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review", 21 U.B.C. L. Rev. 87, 90 (1987) (referring to the examples of criticism by Dworkin (Ronald Dworkin, *A Matter of Principle* 33 (1985)) and Tribe (Lawrence Tribe, "The Puzzling Persistence of Process- Based Constitutional Theories", 89 Yale L .J. 1063 (1980)). As Monahan describes, "the main point made by the critics is that Ely's so-called 'process-oriented' theory itself requires judges to make substantive value choices." *Id.* Monahan goes on to explain that the problem is that Ely regards the making of substantive value choices by judges as illegitimate. *Id.* Thus, as under the critics "the theory is hopelessly and inevitably self-contradictory." *Id.*

38 *Id.* at 151.

39 *Id.* at. 89. *See also id.* at 151 (stating that "[r]eliance on this principle will not eliminate doctrinal ambiguity. But it will enable the courts to coherently sort through the mass of conflicting claims that are certain to arise under the equality clause.").

40 *Id.* at 142.

41 *Id.* at 140.

of democracy. He understands that there is no need to establish prejudice and thus no need for "an inquiry into the motivation behind racially discriminatory legislation."[42] He admits the similarities of his theory to Ely's theory of judicial review, advanced in the American context.[43] However, he stresses that "this first principle must not be interpreted in purely formal and negative terms."[44] While in the same spirit as Ely, suggesting that participation in the political process matters for the standard of judicial review, Monahan further requires an inquiry over prejudice. In Monahan's understanding, participation matters because some interests can be entirely ignored if people who advocate these interests are not present in the political process to defend their theses. Monahan's theory offers valuable insights, but it is still limited to a process-based approach.

Sheppard, another Canadian scholar, calls for a democracy reinforcing theory of judicial review of equality rights under section 15.[45] In particular, she suggests that the contextual factors the Supreme Court uses as indicators for discrimination might usefully be reframed.[46] First, she suggests that the Court should add, among the contextual factors, the factor of the "political exclusion." She suggests this factor as part of "types of harmful effects" the Court should take into account.[47] Second, she suggests that the Court should take into account the factor of "absence of democratic participation" and "absence of consultation."[48] She suggests that these are part of a more comprehensive "Exclusionary Processes and Structural/Systemic Dimensions of Harm" that the Court should take into account as contextual factors.[49] Therefore, Sheppard suggests that contextual factors related to political participation become a part of the test the Supreme Court applies to identify "substantive inequality/discrimination," under section 15. Sheppard's theory certainly is not a mere process-based theory. The suggested contextual factors related to the political exclusion are part of a broader theory which takes into account substantive contextual factors as well. The whole theory is a model of the

42 *Id.* at 151.

43 Monahan, *above* note 37, at 146. Monahan states that "[i]n one sense, this first principle parallels Dean Ely's concern that those in power must not be permitted to impair the formal access of citizens to the political process. The court must protect the basic infrastructure of liberal democracy – rights of assembly, debate, free elections; no citizen may be excluded from participation in the process of collective debate and argument except on compelling grounds." *Id.*

44 *Id.* He is at this point in line with Tribe's criticism of Ely's focus solely on process. In particular, he stresses that, "[t]he court's analysis must take account of the fact that formal access does not guarantee equal access; moreover, it must appreciate the particular concern of legislatures in the past to bridge the gap between formal and effective rights of access." *Id.*

45 Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010).

46 *Id.* at 63.

47 *Id.*

48 *Id.*

49 *Id.*

equality rights under section 15. My suggested theory is in line with Sheppard's notions.

Anne Phillips argues for politics of presence.[50] She finds that "control presupposes presence"[51] and that "we need both ideas and presence."[52] She explains that "[i]t is when the people are involved in the process of working alternatives that they have more chances to challenge dominant conventions."[53] Phillips finds that "[t]he real importance of the politics of presence lies in the way it is thought to transform the political agenda, and it is this that underlies the greater priority now accorded to gender and ethnicity and race."[54]According to Phillips, without a threshold number of seats, others will not be able to understand and changing the gender composition of the elected assemblies is not a guarantee of the result. Instead, this is "an enabling condition" and much will depend on the nature of the decision making process.[55]

50 Anne Phillips, *The Politics of Presence* (1995).
51 *Id*. at 30.
52 *Id*. at 56.
53 *Id*. at 44–5.
54 *Id*. at 176.
55 *Id*. at 83. According to Phillips, "[c]hanging the gender composition of elected assemblies is largely an enabling condition (a crucially important one, considering what is disabled at present) but it cannot present itself as a guarantee. It is, in some sense, a shot in the dark: far more likely to reach its target than when those shooting are predominantly make, but still open to all kinds of accident." *Id*. She goes on: "[t]he only secure guarantee would be those grounded in an essential identity of women, or those arrived at through mechanisms of accountability to women organized as a separate group. … It is possible – if highly unlikely – that assemblies composed of equally women and men will behave just like assemblies in which women have a token presence; it is possible – and perhaps very likely – that they will address the interests of certain groups of women while ignoring the claims of others. The proposed change cannot bring with it a certificate of interests addressed if even a guarantee of good intent. In this, as in all areas of politics, there are no definitive guarantees." *Id*. at 82. Further, "[a]t each moment it matters immensely who can claim the authoritative interpretation; and, while much of the battle for this rages across the full terrain of civil society, groups excluded from state agencies or legislative assemblies will have significantly less chance of establishing their own preferred version. Neither needs nor interests can be conceived as transparently obvious, and any fair interpretation of either then implies the presence of the relevant group." *Id*. at 83.

Later, she quotes and agrees with Cass Sunstein, who argued that "deliberative processes will be improved, not undermined, if mechanisms are instituted to ensure that multiple groups have access to the process and are actually present when decisions are made. Proportional or group representation, precisely by having this effect, would ensure that diverse views are expressed on an ongoing basis in the representative process where they might otherwise be excluded.". *Id*. at 152 (citing Cass Sunstein, "Preferences and Politics", 20 Phil. & Pub. Aff. 1, 33 (1991)). *See also* Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 145 (1995) (commenting on Phillips' argument).

Phillips agrees with Pitkin that seeing representation as a process,[56] suitable representation is dependent on relationships between the represented and representatives.[57]

Therefore Phillips's call is an effort to enhance real participation in the debate and the influence the people have on decisions that affect their interests. Her theory is a process-based theory and it concerns itself with how the people – through the process – can influence the substantive outcomes. This influence is only possible necessarily through the political process. She appeals to notions of non dominance and control of decisions that affect one's interests. For her, politics of presence matter because of the exclusive existing structure of power.[58]

Lani Guinier finds that fixed majorities, which lead to permanent winners and losers, are antidemocratic. She discusses alternatives of voting – cumulative voting and veto, and she advocates for such group representation as to prevent and remedy tyranny of the majority.[59] She finds that race in the United States is "too often the divide along which victories and defeats can be measured."[60] Thus, the heavy reliance on one person, one vote jurisprudence to develop a theory of democracy fails.[61] She understands that voting is a right of the individual which is "best realized in association with other individuals i.e. as a group."[62] According to Guinier, the commitment to consensus politics,

56 Phillips, *above* note 50, at 82 (stating, "[] I am very much with her in seeing representation as a process.")

57 *Id.* at 82. Phillips writes: "[f]air representation is not something that can be achieved in one moment, nor is it something that can be guaranteed in advance. Representation depends on the continuing relationship between representatives and the represented, and anyone concerned about the exclusion of women's voices or needs or interests would be ill-advised to shut up shop as soon as half those elected are women." *Id.*

58 *Id.* at 182 (stating, "[i]f political presence matters, it is because existing structures of power and representation have denied the pertinence of excluded perspectives and concerns, and the re-assessments implied in this cannot be tackled though ceding power to a diversity of relatively autonomous voluntary groups. The hope (if not always the expectation) is that increasing the proportion of our representatives who come from disadvantaged and excluded groups will challenge and subsequently modify the basis on which public policy is defined. This can occur only in contexts which bring the differences together: where representatives who originate from another, and where the interaction between them produces something new. The only possible forum for this is that more inclusive assembly which draws together representatives from the citizenry as a whole: an assembly that might be local, regional, or national, but should in principle represents all.).

59 *See generally*, Lani Guinier, *The Tyranny of the Majority, Fundamental Fairness of Representative America* (1994). *See also id.* at 139 (distinguishing group rights from group representation).

60 *Id.* at xiii.

61 *Id.* at 124.

62 *Id.* at 125 (referring to Justice Powell who recognized that "[t]he concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not.").

implicit in the one vote, one value, benefits all voters. She emphasizes the "receptivity of new ideas," "the stability based on inclusiveness and not quietude" and "positive sum possibilities rather than limiting participation to winners and inevitable losers."[63] She believes that "the concept of democratic accountability is more participatory and less hierarchical."[64] Guinier also finds that the theory of "checks and balances – of ambition checking ambition … is equally if not more, compelling than the separation of powers."[65]

Furthermore, Guinier links participation to choice and autonomy. In particular, she sees that participation and exercise of choice that come from broad-based participation are valued, because they enhance a citizen's autonomy.[66] For her "voting rights are a means of political empowerment."[67] "[V]oting creates 'a personal value,' or a symbolic statement of belonging, by the mere act of casting a ballot."[68] Her work is based on the question of "how those at the bottom at this geometric pyramid would like to see more openings."[69]

Independently of whether one agrees or disagrees with the specific proposals by the above mentioned scholars, one can observe that all these scholars are concerned about finding the way for a more participatory and inclusive society. They all see the significance of participation in the political system in a democratic society.

Absence of systemic political disadvantage provides secure and thus equal belonging in a public relationship. People who face a systemic political disadvantage cannot have equal participation in substantive terms. There can be at least two types of political disadvantage: the political disadvantage related to the personal and institutionalized power and ideological political disadvantage. Only one of them is a systemic disadvantage which violates *the right to equal belonging*: the institutionalized political disadvantage.

In particular, the institutionalized political disadvantage is based on personal power and disadvantage, and not on the content itself of particular ideas. In the case of the institutionalized political disadvantage, it is likely that there are structurally disadvantaged political players, who are permanent or predictable losers regardless of their ideas. Thus, their institutionalized powerlessness to influence the political debate leaves them, in practice, with a permanent limited or passive role in this debate. But, equal belonging is an active notion. To belong as equal

63 *Id.* at 155.
64 *Id.* at 173.
65 *Id. at* 173 (quoting The Federalist No. 51, at 322 (James Madison) Clinton Rossiter ed., 1961) ("[A]mbition must be made to counteract ambition[.]").
66 *Id.* at 175.
67 *Id.* at 125.
68 *Id.* at 126.
69 *Id.* at 176.

can not mean a passive belonging.[70] It means engagement in the relationship, which is inherently an active notion. These people who suffer from an institutionalized political disadvantage are not really part of the political market or play.

In the second case, the case of the ideological political disadvantage, people lose because of their ideas themselves. There can be ad hoc losers or even permanent losers, but this loss of political battle is based on their ideas, rather than as a result of their social and economic advantage, which constructs an arbitrary political inequality of power. While the first disadvantage is not acceptable in a democratic debate, the second type of disadvantage is a *sine qua non* element. What is not acceptable is a political advantage of power which stems from a social and economic inequality. Therefore, while the first disadvantage shows a democratic malfunction, this second disadvantage shows disagreement, which is at the heart of democratic debate. In democracy, the weaker ideas, and not the weaker people, lose.

Now, you may say, "easier said, than done. How are you going to distinguish in practice in the legal analysis of these two types of disadvantages?" It is indeed a difficult undertaking. The above distinction of the institutionalized from the *ideological political disadvantages*, as it has been described, is still too theoretical. The reason is because it is not always clear when some people lose because of their ideas themselves, or because of their personal disadvantage of political power. Let me now continue my effort to provide some more conceptual tools to distinguish the institutionalized from the *ideological political disadvantages*.

Adopting and building on the general substantive understanding of equal participation beyond formalities and using Young's reasoning and terms as well, it is suggested that the *personal* and institutionalized *disadvantage of power*, which leads to *a systemic political disadvantage* can exist in the following forms: (a) disadvantage, in the form of non access to the decision making; (b) disadvantage related to the articulation of the argument. This can be a disadvantage to articulate or a disadvantage related to the style to articulate the argument, in Young's sense of rhetoric; (c) disadvantage in Young's sense of greeting; (d) disadvantage of shared understanding of and the need within the narrative, in Young's sense of narrative; (e) psychological disadvantage to present the argument in the sense of anxiety. This is a disadvantage related to the emotional aspect of political inequality and to *the right to minimum comfortable belonging* that I discuss in Chapter 5. This disadvantage may be linked to the fact that the person who argues feels isolated or under stereotype threat or otherwise, not belonging equally in the community of equal members of the debate. Therefore, if one wants to see at the realities and beyond formalities, the assessment of the relationships of the political interaction appear to be very complicated.

70 I am grateful to my friend Martine, who emphasized this point when she read a draft of Chapter 1.

A continuum is used here to illustrate better how the systemic or institutionalized and personal political disadvantage is suggested to be understood. It is a spectrum of the relationships of political interaction. One edge is "disagreement." The other is "tyranny of the majority."[71] In the middle is "courage to dissent."[72] The institutionalized and systemic political disadvantage is a disadvantage which falls within the range between tyranny of the majority and institutionalized courage to dissent. The ideological political disadvantage is a disadvantage which falls within the range between disagreement and ideological courage to dissent. While the first range covers all the disadvantages which express the "law of the most powerful," the second range covers all the possible disadvantages which express "a battle of mere ideas." The band can be illustrated as follows:

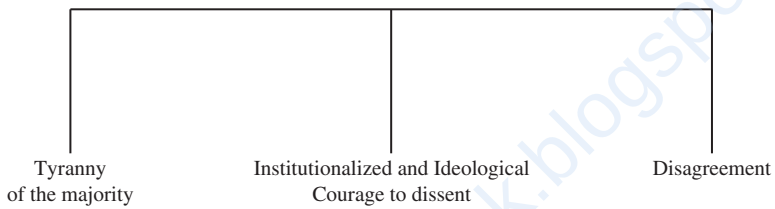

Figure 3.1 A continuum of the relationships of political interaction

Montesquieu's descriptions of despotic, monarchical, republican, aristocratic and democratic governments can be explained in relation to the above spectrum of the relationships of political interaction. Montesquieu's despotic government is closer to the nature of the political relationships, which fall within the first half of the ruler. "In despotic government, one alone, without law and without rule, draws everything along by his will and caprices."[73] His description of a monarchical government is linked to relationships which fall also in the first half of the continuum. In such a government "one alone governs, but by fixed and established laws."[74] The political relationships in such a government do not even reach the point of having political relationship which someone needs "courage to dissent." There is no way to dissent to one single man's conviction of what law requires. He, himself, alone rules. Montesquieu's description of the republican government is only partly closer to the relationships which fall within the second half of the band. There "the people as a body, or only a part of the people, have sovereign power."[75] His description of

71 Inspired and borrowing from the title of Guinier's book and building on this title. Guinier, *above* note 59.

72 Inspired and borrowing from the title of Tomiko Nagin-Brown's book and building on this title. Tomiko Nagin-Brown, *Courage to Dissent: Atlanta and the Long History of the Civil Rights* (2012).

73 Montesquieu, *The Spirit of the Laws* (tr. Anne M. Cohler et al., 1989), Book 2, Ch. 1, at 10.

74 *Id.*

75 *Id.*

aristocracy is linked to political relationships which fall partly within the first range of the ruler, and partly within the second part of the ruler. As he describes, in aristocracy "the sovereign power is in the hands of a part of the people."[76] On one hand, the political relationships between the rulers and the ruled ones in aristocracy, fall within the first half of the ruler. On the other hand, the relationships among the members of the ruling class/the aristocrats fall within the second half of the ruler. It is only in the case of democracy that the political relationships fall entirely in the second half of the continuum. In democracy "the people as a body has a sovereign power."[77] It is only in democracy that a battle of the power of ideas, and not of the personal power, can happen and formulate the political relationships among all the members of the body of holders of sovereign power. Montesquieu distinguishes two sorts of tyranny: "a real one, which consists in the violence of the government, and one of opinion, which is felt when those who govern establish things that run counter to a nation's way of thinking."[78] Providing that the nation is understood as an inclusive community of equals, it is the second sort which is mainly the most common in modern democracies. However, we also see examples of the first kind of tyranny.

Lawrence Tribe criticized the process-based theories of judicial review. He finds that Ely's theory is one of those process theories. Monahan's theory is a process-based theory too. The essence of Tribe's criticism is the need for a substantive theory, which is lacking in the process-based theories. For Tribe, process is always substantive and instrumental, serving and including substantive rights assessments.[79] Tribe criticizing Ely's process theory, explains for example that discrete and insular minorities can be defined only by appealing to a substantive theory which is overlooked by Ely. In doing this, Tribe gives significant insights while trying to find out what would distinguish groups which can likely fall within the category of discrete and insular minorities from other groups which cannot fall with the same category. In particular, he points out that the process-based theories do not explain why the exclusion of burglars, who face hostility, can not be a suspect classification.[80] He finds that any justification of the distinction, between the groups who deserve special judicial protection and the groups, which do not, needs to be based on a substantive theory.[81] Tribe does not reject the importance of the process and participation. His point is that the process is instrumental and cannot stand without a substantive theory.

76 *Id.* at 10, Book 2, Ch. 2.
77 *Id.* at 10, Book 2, Ch. 2.
78 *Id.* at 309, Book 19, Ch. 3 "On tyranny."
79 *See generally* Tribe, *above* note 37. *See also* at 1071 (referring to the substantive and instrumental character of the process).
80 *Id.* at 1075.
81 *Id.* at 1076 (stating that "[a]ny constitutional distinction between laws burdening homosexuals and laws burdening exhibitionists, between laws burdening Catholics and laws burdening pickpockets, must depend on a substantive theory of which groups are exercising fundamental rights and which are not.").

My suggested theory adapts to Tribe's criticism of the process-based theories of judicial review. I agree with Tribe that any judicial review theory should also appeal to a substantive theory. I also agree that process is instrumental. The suggested theory is both process- and substance-based. First, the contextual factor of the systemic political disadvantage is part of a judicial review theory of *the right to the secure belonging in a community of equals*. Second and related to the first, the contextual factor of systemic political disadvantage is instrumental to realize the substantive right: *the right to equal belonging in a democratic society* and its inherent rights. However, such arguments were not used in Ely's and Monahan's theories. Ely proposes a judicial review theory for the right to equal protection of the American Constitution, while Monahan proposes a judicial review theory for section 15. Tribe's criticisms are exactly that the process-based theories interpreting the rights in a process-based approach instead of a substantive theory. Indeed, neither Ely nor Monahan provide a clear and explicit connection of process and substance.

My suggested theory is not in conflict with Tribe's insights. The reason that the contextual factor of the systemic political disadvantage can stand alone and trigger a more rigorous judicial intervention is substantive. The systemic political disadvantage is discriminatory, as it enhances the risk of domination rendering the belonging of the claimant in a community of equals unsafe and insecure. There is thus *a prima facie violation of the right to equal belonging in a democratic society*. The systemic political disadvantage appeals to the substantive "right to equal protection of the laws," or in other words, *the right to equal belonging in a democratic society*. The kind of participation in the political system that one enjoys determines to a large extent the kind of her or his belonging in the society.

As far as Tribe's remark of what distinguishes the group of "burglars" from other groups that can be considered as a suspect classification and thus deserving special judicial protection, the suggested theory answers as follows: burglars do not face an institutionalized *political disadvantage in a democratic society*. They face a political disadvantage because of the content of their activities which are seen as morally wrong in the modern democracies. In the same spirit, a restriction of freedom on the class of the white collar criminals involved in money laundering will also fall to the non suspect classifications. It is the content of their activities that has lost in a battle of ideas and morals in the modern democracies. In this case, their political disadvantage is ideological. Any disagreement on restrictions upon the class of burglars and money laundering criminals relate to political relationships which will fall within the second range of relationships in the suggested "ruler of relationships of political interaction." These are the relationships which fall within the range between the ideological courage to dissent and disagreement. Any political disadvantage is a consequence of their ideological political and moral disadvantage.

Thus, the absence of a systemic political disadvantage assessed in substantive terms (and not in an "illusory and theoretical" sense) can be a factor that can

contribute to a secure membership in the society. The existence of the systemic political disadvantage assessed in a contextual and substantive approach should be a contextual factor in the judicial analysis identifying a violation of the *right to secure belonging in a community of equals*. The establishment of the systemic political disadvantage should indicate the violation of *the right to equal belonging in a democratic society*. In other words, such *ad hominem* political disadvantage in the political relations and structure should be seen to establish a violation of *the right to secure belonging in a community of equals* and *a prima facie violation of the right to democratic belonging*. The reader can also see some related insights to representativeness in Chapters 4 and 2. For example Chapter 2 offers legal tools for the judge to assess whether there is *ad hominem political disadvantage*, which is undemocratic. Next, I provide the second contextual factor in the suggested analysis of the *right to secure belonging in a community of equals*.

II. Absence of Prejudice

The second contextual factor in the suggested analysis is the absence of prejudice. To feel secure in a [public] relationship means that every member trusts that the other members will not treat him or her with prejudice. Prejudices are "evaluations of or affective responses towards a social group and its members based on preconceptions."[82] Prejudice in a relationship generates insecurity because it is a relationship in which the members can not feel equals. The nature of prejudice and its harms are complex. Any judgments which do not take into account this complexity have high levels of probability to be considered simplistic and inaccurate. Such judgments would be necessarily insufficient to capture the reality of the "powerful experience of prejudice"[83] and its harm. Simplistic judgments on the experience of prejudice and its effects will be thus necessarily unjust. Litigators and judges who deal with the contextual factor of prejudice need to be consulted by social scientists, who have spent years of their scientific and academic life in studying prejudice and its effects. Regardless the difficulty for a litigator and a judge to understand the powerful experience of prejudice and its harm using solely their traditional legal training, prejudice is suggested to be one of the contextual factors the judge should look at to identify any violation of *the right to equally secure belonging*.

The effort here is not to provide any exhaustive and innovative or rigid definition of what is prejudice. But instead, I suggest that acknowledgement of

82 David M. Amodio, "The Neuroscience of Prejudice and Stereotyping", 15 Nature Rev Neuroscience 670–682, 770 (2014); *see also id.* (quoting G. W. Allport, *The Nature of Prejudice*, (Addison-Wesley, 1954): "preconceptions – often negative – about groups or individuals based on their social, racial or ethnic affiliations.")

83 Borrowing the words used by Michael Inzlicht, Alexa M.Tullett, and Jennifer N. Gutsell, "Stereotype Threat Spillover: The Short and Long term Effects of Coping with Threats to Social Identity", *in Stereotype Threat, Theory, Process and Application* 107, abstract (ed. Michael Inzlicht & Toni Schmader) (2012).

prejudice, in whatever form should be a part of the judicial analysis of *the right to equal belonging*, in the following sense: the establishment that the impugned legislation imposes a distinction based on prejudice should lead the judge to conclude *a prima facie violation of the right to equal belonging in a democratic society* and *a violation of the right to secure belonging in a community of equals.* In this case, the relevant person does not have a secure belonging in a community of equals.

The suggestion that prejudice is a contextual factor to identify violation of equal belonging in the sense of secure belonging draws upon an analogy provide by the judicial analysis of the Supreme Court of Canada under section 15. First, the Supreme Court of Canada sees that "substantive inequality/discrimination" can be established through the establishment, perpetuation, or promotion of prejudice.[84] The applicable test for the Court is whether the impugned legislation "has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society."[85] As the Court goes on to explain, "[a]n adverse distinction therefore discriminates by perpetuating prejudice if it denotes an attitude or view concerning a person that is at first glance negative and that is based on one or more of the personal characteristics enumerated in s. 15(1) or on characteristics analogous to them."[86] Abella J., provides similar views. She finds that, "[p]rejudice is the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member."[87]

The Court has expressed this test since 1999 and has confirmed it since then in the most recent equality jurisprudence.[88] Establishing that the impugned legislation imposes an adverse distinction based on prejudice, the Supreme Court of Canada concludes a prima facie violation of the right under section 15. The question remained is whether any restrictions of the right are justified in a democratic society.

Furthermore, LeBel J., in *Quebec*, has quoted Denise Réaume's insights on prejudice.[89] Overall, Réaume considers prejudice as behavior characterized by

84 *See, e.g.*, Quebec (Att'y Gen.) v. A, 2013 SCC 5, para. 192, [2013] 1 S.C.R. 61 (Can.) (per LeBel, J. minority on section 15, writing on prejudice and stating that "[t]he first way that substantive inequality – discrimination – may be established is by showing that the impugned disadvantageous law, in purpose or effect, perpetuates prejudice against members of a group on the basis of personal characteristic covered by s. 15(1): *Withler*, at para. 35.").

85 *Id.*

86 *Id.* at para. 193.

87 *Id.* at para. 326 (per Abella, J. majority view on section 15(1)).

88 *Id.* at para.192 (finding the test "of particular importance" and that it enables the judiciary "to consider such discrimination without lapsing totally into subjectivism.").

89 Quebec (Att'y Gen.) v. A, 2013 SCC 5, para. 195, [2013] 1 S.C.R. 61 (Can.). (per LeBel, J. minority on section 15 of the charter, writing on prejudice, quoting

feelings of inferiority and superiority, subordination, and hierarchy.[90] She understands this assault to be translated, as an absence of "the basic human respect," and consequently an assault "on the sense of self."[91] LeBel J., stresses through Réaume's insights, "the individual and the social dimension of personal identity," and consequently that group affiliation is part of the self.[92]

Others from various disciplines have been concerned with the notion of prejudice. Gordon W. Allport in his influential book *The Nature of Prejudice* defines it as follows: "an aversive or hostile attitude toward a person who belongs to a group, simply because he belongs to that group, and is therefore presumed to have the objectionable qualities ascribed to the group."[93] He also defines ethnic prejudice: "[e]thnic prejudice is an antipathy based upon a faulty and inflexible generalization. It may be felt or expressed. It may be directed toward a group as a whole, or toward an individual because he is a member of that group." Moreover, "[t]he net effect of prejudice, thus defined, is to place the object of prejudice at some disadvantage not merited by his own misconduct."[94]

Many other scholars wrote about prejudice. For instance, for Anderson, prejudice is a child of ignorance.[95] For Justice Marshall, Allport and Minow, "[t]he root of prejudice is the separation between groups that exaggerates

Réaume and commenting on Denise G. Réaume, "Discrimination and Dignity", 63 La. L. Rev. 645, 679–681 (2003)).

90 *Id.*

91 *Id.*

92 *Id.* As LeBel, J., goes on to write: "[v]ery importantly Réaume stresses both the individual and the social dimension of personal identity. She emphasizes that "we develop a sense of self only through our interactions with others" and that "the kinds of characteristics that people regard as important to their sense of self tend to be, at the same time, characteristics by which they define themselves as individuals and through which they identify as members of a group". Thus, Réaume understands group affiliation "as any purely individual understanding of the self". She recalls and acknowledges that "it has tended to be precisely this aspect of identity that has often been targeted for contempt – *individuals* have been denied respect through use of a characteristic identifying them as part of a *group* that is devalued." *Id.* at para. 195 (commenting on Réaume, *above* note 89).

93 Gordon W. Allport, *The Nature of Prejudice* 8 (1958). *See also id.* at 9–10 (discussing the distinction between prejudice and simple misconceptions or ordinary errors of prejudgment). As he explains "[p]rejudgments become prejudices only if they are reversible when exposed to new knowledge. A prejudice, unlike a simple misconception, is actively resistant to all evidence that would unseat it. We tend to grow emotional when a prejudice is threatened with contradiction. Thus the difference between ordinary prejudgments and prejudice is that one can discuss and rectify a prejudgment without emotional resistance." *Id.*

94 *Id.*.

95 Elizabeth Anderson, *The Imperative of Integration* 12, n. 20 (2010) (noting on the case of the United States, "where, despite Americans' beliefs that they live in an equal opportunity society, class mobility is low in absolute terms and much lower than in Canada or the Scandinavian countries.").

differences."[96] Brameld wrote in 1947 that when groups "are isolated from one another," "prejudice and conflict grow like a disease."[97] Prejudice is a notion which attracts the attention of lawyers, philosophers, political scientists, psychologists and others.

Montesquieu would consider himself "the happiest of mortals," if he "could make it so that men were able to cure themselves of their prejudices." He called "prejudices not what makes one unaware of certain things but what makes one unaware of oneself."[98] It seems that the essence of prejudice is two-fold. It is, on the one hand, a sense of inferiority caused to the people against the prejudice. On the other hand, it is the sense of superiority felt by the people who act in prejudice. In both ways, as Montesquieu said, prejudice constitutes ignorance of oneself.

The above insights depict again the notion of exclusion from society or the unequal belonging in this society. First, the person who is either viewed as less capable or less worthy of recognition or value as a human being cannot be secure in a relationship of equals. Being viewed like this, one is excluded from the universal community of equal human beings. The human dignity and basic human respect are directly violated in the case of prejudice, both in real and legal terms. Réaume understands that because prejudice is a violation of the "basic human respect" and an assault "on the sense of self," prejudice is also an assault of human dignity. However, the notion of "respect" is more tangible for the judge. It is, thus, safer for the judge and the policymaker to trace and apply either as a judicial review theory or a public policy respectively. Second, under the Canadian test, the person who faces prejudice is a person who is viewed as less capable or less worthy of recognition or value as a member of the larger society. Being viewed like this, one is excluded from the community of equal members of the society. Therefore, the exclusion has an individual and social dimension. Both relate to "a basic human respect," and thus human dignity, in an individual and social dimension.

LeBel J., in *Quebec* quotes Réaume, recognizing the individual and social dimension of the self and identity. These insights are in line with the Aristotelian notion of human being as a social being. However, whereas the individual dimension of the self relates to human dignity in more direct terms, the social dimension relates to human dignity in more indirect and relational/comparative terms. Such exclusion therefore also includes a political character.

96 Minow, *Making all the Difference: Exclusion, Inclusion and American Law* 117 (1990) (citing Justice Marshall in *Cleburne*, who cited Gordon Allport, *The Nature of Prejudice*).

97 Thomas F. Pettigrew and Linda R. Tropp, "Allport's Intergroup Contact Hypothesis: Its History and Influence", *in On the Nature of Prejudice. Fifty Years after Allport* 263 (ed. John F. Dovidio et al. 2005) (citing Brameld, at 245).

98 Montesquieu, *above* note 73, Xliv, at preface. As he says, "I would consider myself the happiest of mortals if I could make it so that men were able to cure themselves of their prejudices. Here I call prejudices not what makes one unaware of certain things but what makes one unaware of oneself." *Id.*

Réaume illustrates the relational dimension of basic human respect and human dignity due to the individual and social dimension of personal identity, which is harmed from prejudice. In this sense, basic human respect and human dignity have both a personal and a political dimension. Consequently, pure individualism in the sense of a process of detaching the self from the group affiliation does not find any support on such understanding.[99] In this sense, the prejudiced person cannot feel a secure belonging in a relationship with other members that assault his/her self. The exclusion caused by prejudice sends the message that not all the people belong to particular communities of equals: both the universal one of the family of human beings[100] and the territorially restricted one of the particular society.

Courts do not usually cite literature from social sciences in their effort to analyze prejudice. *Brown v. Board of Education* stands as a landmark exception.[101] Analysis of the nature and harm of prejudice is a field with decades of research by social scientists. For example, Gordon W. Allport wrote an influential book on the nature of prejudice, which has led the next generations of social scientists to check whether his conclusions were correct and efficient. In particular, as it has been described, Allport adopted a "positive factors" approach. He suggested that the presence of four positive features of the intergroup contact can reduce prejudice: (a) equal status between the groups; (b) common goals; (c) intergroup cooperation; and (d) the support of authorities, law, or custom.[102] Allport was the leading expert of his time on the nature of prejudice.[103]

99 *See also* Sandra Fredman, *Human Rights Transformed. Positive Rights and Positive Duties* 16–18 (2008) arguing that "society both shapes the individual and makes possible the range of options necessary for full human functioning." *Id.* at 18. *See also id.* at 16–18 her references to Aristotle, Hegel, Habermas, Rawls and Raz.

100 Donna Greschner, "The Purpose of the Canadian Equality Rights", 6 Rev. Const. Stud. 291, 301 (2001–2002) (referring to the equal belonging in the community of human beings).

101 Brown v. Board of Ed., 347 U.S. 483 (1954) (citing Kenneth B. Clark, *Effect of Prejudice and Discrimination on Personality Development: Confidential Draft for the Use of the Technical Committee on Fact* (Mid-century White House Conference on Children and Youth, 1950); Helen Leland Witmer and Ruth Kotinsky, *Personality in the Making* (Mid-century White House Conference on Children and Youth, 1950) (1952); Max Deutscher and Isidor Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion", 26 J. Psychol. 259 (1948); Isidor Chein, "What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?" 3 Int. J. Opinion and Attitude Res. 229 (1949); Theodore Brameld, "Educational Costs", *in Discrimination and National Welfare* 44–88 (MacIver, ed., (1949)); Edward Franklin Frazier, *The Negro in the United States* (1949); citing also generally Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern* (1944).).

102 Pettigrew and Tropp, *above* note 97, at 262, 264.

103 Allport, *above* note 93, bio at the beginning of the book. As it was reported, "[H]e was appointed Professor of Psychology at Harvard in 1930; he was a President of both the American and Eastern Psychological Associations, director of the

Fifty years later, psychologists are still testing Allport's results. In 2004, Thomas F. Pettigrew and Linda R. Tropp completed a "meta-analysis of intergroup contact effects to review and evaluate this vast research literature."[104] They report that the studies support Allport's four factors,[105] but they suggest a modification.[106] Suggesting future directions, they report that "Allport's conditions are better thought of as facilitating, rather than essential, conditions for positive contact to occur."[107] They also emphasize the need for further research on the moderators and mediators of intergroup contact's effects. They suggest another approach, which focuses also on negative factors of intergroup contact and tries to answer relevant aspects that Allport left unanswered. They emphasize the role of emotions and the need for future research.[108] Therefore, social scientists, after so many years of research, provide us some answers, but future research will provide more necessary answers to Pettigrew and Tropp's results.

National Opinion Research Center, editor of the Journal of Abnormal and Social Psychology and was the author of a number of books." *Id.*

104 Pettigrew and Tropp, *above* note 97, at 266–268.

105 *Id.* at 264; *see also id.* at 264–266 (referring to the particular studies). As Pettigrew & Tropp report, "[s]tudies conducted since Allport's original formulation generally support the importance of his four key conditions for intergroup contact to reduce prejudice.". *Id.*

106 *Id.* at 270 (explaining their findings and suggesting modification of Allport's original conceptualization of intergroup contact theory). *See also id.* at 268 (explaining that "[t]he primary thrust of our meta-analysis centered on the effectiveness of Allport's conditions for achieving positive intergroup outcomes.").

107 *Id.* at 271–272 (stating that "our results indicate that, while these factors are important, they are not necessary for achieving positive effects from intergroup contact. Instead, Allport's conditions are better thought of as facilitating, rather than essential, conditions for positive contact to occur. This shift in perspective challenges the original 'positive factors' approach taken by Allport in *The Nature of Prejudice*. But this revised view is consistent with the contentions of other theorists who propose that greater contact and familiarity typically contribute to increased liking (e.g., Homans, 1950; Zajonc, 1968).").

108 *Id.* at 272 (saying that " [i]n many ways, this stance reverses Allport's approach. It starts with the prediction that intergroup contact will generally diminish prejudice, but the magnitude of this effect will depend on the presence or absence or a large array of facilitating factors – not just the four emphasized by Allport. In particular, this approach focuses special attention on those negative factors that can subvert contact's typical reduction of prejudice. Thus, this approach leads to an emphasis on the need for further research on the moderators and mediators of intergroup contact's effects. This emerging emphasis in intergroup contact research address directly those questions left unanswered by Allport concerning the generalization of contact's effects and the processes underlying these effects." (quoting also relevant studies)).

See also id. at 272 (pointing the role of the emotions regarding the mediators of intergroup contact stating that "[e]motions such as anxiety and threat are especially important negative factors in the link between contact and prejudice." (quoting also relevant studies)).

At the same time, modern analysis views prejudice as a more complicated instrument that is not necessarily intentional and should be assessed in context. To act on prejudice does not necessarily mean that one acts by intention. Allport first explains how the prejudicial behavior is linked with the general way of thinking and cognition a person has.[109] Geoffrey Beattie further develops this unintentionality in his book *Our Racist Heart*, explaining "distinct ethnic biases which do operate in decision making"[110] that are "connected to measures of implicit attitude,"[111] which are "not subject to conscious reflection."[112] Anderson explains a phenomenon called "aversive racism." It is a "discriminatory treatment mediated by unconsciously biased evaluations." Such treatment thus "acquires the appearance of unprejudiced conduct."[113]

109 Allport, *above* note 93, at 170–171 (1958) (writing on "The Dynamics of Cognition in the Prejudiced Personality," he points out a "momentous discovery of psychological research in the field of prejudice."). As Allport explains: "[t]he cognitive processes of prejudiced people are in general different from the cognitive processes of tolerant people. In other words, a person's prejudice is unlikely to be merely a specific attitude toward a specific group; it is more likely to be a reflection of his whole habit of thinking about the world he lives in. For one thing, research shows that the prejudiced person is given to two valued judgments in general. He dichotomizes when he thinks of nature, of law, of morals, of men and women, as well as when he thinks of ethnic groups. For another, he is uncomfortable with differentiated categories; he prefers them to be monopolistic. Thus, his habits of thought are rigid. He does not change his mental set easily, but persists in old ways of reasoning –whether or not this reasoning has anything to do with human groups. He has a marked need for definiteness; he cannot tolerate ambiguity in his plans. When he forms categories he does not seek out and emphasize the true 'defining' attribute, but admits many 'noisy' attributes to equal prominence." *Id.* at 170–171.

110 Geoffrey Beattie, *Our Racist Heart* 250 (2013).

111 *Id.*

112 *Id.* at 250–251. According to Beattie, "[t]he book shows that there are distinct ethnic biases which do operate in decision making here and that these ethnic biases are connected to measures of implicit attitude. These implicit attitudes are quick, automatic and not subject to conscious reflection, but they do seem to impact on shortlisting decisions, and ethnically also impacts on patterns of unconscious eye movements where people build up the 'rational' evidence for making a decision one way or another." *Id.* at 250–251.

See also id. at 250 (stating that "[t]his book has tried to expose the role of implicit biases in everyday life and tried to show how they might have an impact in a variety of situations, including employment-based decision making in one particular context, the modern, meritocratic British university."); 255 (stating that "[i]n other words, if we accept that implicit biases do exist then our number on and immediate priority has to be to prevent them manifesting themselves in ways that can prevent fairness from operating.").

113 Anderson, *above* note 95, at 49 (saying that "[t]he fact that ideas can be practically engaged without being consciously endorsed helps explain the phenomenon called 'aversive racism.' This occurs when people sincerely report nonprejudicial attitudes and support for principles of antidiscrimination yet discriminate against stigmatized racial groups in ambiguous situations, where their conduct could be rationalized in nonracial terms. To the extend that cognitive bias lead people to

Therefore, intention is not a *sine qua non* constituent element of the phenomenon of prejudice.

Along these similar lines, the Justices of the Supreme Court of Canada all adopt (or at least profess) an effects-based approach in the analysis of prejudice and stress the need for a contextual analysis.[114] The jurisprudence of the Canadian Supreme Court prohibits the government from showing "certain individuals greater respect and consideration simply because they share an enumerated or analogous personal characteristic."[115]As it has been explained, "[s]uch laws would express or perpetuate prejudice against certain individuals by establishing a hierarchy of worth based on prohibited grounds of discrimination, such as sex or sexual orientation."[116] Therefore, in the Canadian two-step approach, the inquiry over the violation of section 15 does not end at the question of whether there is an adverse distinction based on enumerated or analogous grounds. The question to determine whether there is a substantive discrimination in the cases where prejudice is relevant is whether the message at issue engenders "a hierarchy of worth." In the Canadian

recognize and recall stereotype – confirming evidence more readily, and to attribute white success to virtuous dispositions and black success to accidental circumstances or external help, their own judgments will rationalize treating whites better than blacks on nonracial, meritocratic grounds. Discriminatory treatment mediated by unconsciously biased evaluations acquires the appearance of unprejudiced conduct. While some people may be dissembling about their attitudes in such cases, others may simply be unaware of the ways their stigmatizing ideas are influencing their behavior. Since cognitive biases often operate unconsciously, people are poor judges of whether their conduct is discriminatory or based on stigmatized ideas.").

114 *See, e.g.*, Quebec (Att'y Gen.) v. A, 2013 SCC 5, para. 193, [2013] 1 S.C.R. 61 (Can.). (per LeBel, J. minority on section 15, writing on prejudice). According to this part of the opinion, "[a]n adverse distinction can also be inconsistent with s. 15, even if there is no discriminatory intent whatsoever, if it has a discriminatory effect.". *Id.* The opinion goes on to explain that this conclusion follows its understanding of equality as "an expression of the values of a society in which all are secure in the knowledge that they are recognized at law as human beings equally entitled to respect[.]". *Id.* Furthermore, "since equality is an expression of the values of a society in which all are secure in the knowledge that they are recognized at law as human beings equally entitled to respect, the perpetuation of such a negative view constitutes a denial of substantive equality." *Id.*; see also *id.* at para. 194 (explaining that the differential treatment based on individual merit or capacity or the section 15(2) of the Charter are examples of such lawful differential treatment).

115 *Id.* at para. 194; *see also id.* at para. 196 (stressing again that the prejudice is not necessarily intentional). The understanding of the Court that the prejudice is not necessarily intentional falls also within the general approach of the Court which applies a contextual, substantive and purposive approach focusing on the impact of the legislative distinction on the reality of the claimant.

116 *Id.* at para. 197.

Court, the context and the vulnerability of the claimant,[117] "the nature or scope of the benefit or interest which the claimant feels he or she has been denied," and the messages this denial of the benefit sends are all crucial to the contextual analysis of prejudice. As it has been explained, the Court asks the following question;

> [d]oes the distinction restrict access to a fundamental social institution or impede full membership in Canadian society? If the answer is yes, this could indicate that the Government action expresses, or has the effect of perpetuating, prejudice against – i.e., a lower or demeaning opinion of – certain persons.[118]

This jurisprudence emphasizes the vulnerability of the claimant and the nature and scope of the denied benefit. I share this emphasis on the vulnerability of the claimant and the nature of the involved interests in the certain benefit at stake. It is only then, and in the light of the individual and social dimension of the personal identity,[119] that both the policymaker and the judge can start the assessment of whether the message which is sent by the denial of a certain benefit is one of unequal belonging in the form of insecure belonging in a community of equals.

Furthermore, the inquiry of prejudice is a contextual one. In 1958, Allport explained the variety in approaches to analyzing prejudice: the historical approach; sociocultural;[120] situational;[121] approach via personality dynamics and structure;[122] phenomenological;[123] approach via stimulus object.[124] He

117 *See, e.g., id.* (Per LeBel, J., explaining that, "[t]he identification of such prejudice will require a contextual inquiry, which might take account, among other things, of the disadvantages suffered by groups defined by a common personal characteristic.").

118 *Id.* at para. 200 (per LeBel, J., minority on section 15, writing on prejudice).

119 *Id.* at para. 195 (quoting Réaume).

120 Allport *above* note 93, at 30 (discussing approaches with sociocultural emphasis and acknowledging thus the influence of the need for an environment free of prejudice on the person's decision making for a geographical community to live). One can reflect again in terms of belonging: What else is this acknowledgement than an acknowledgment that a person needs to have a sense of an equal belonging, being that free of prejudice and full member of the community?

121 *Id.* at 208 (discussing several theories of prejudice which have a situational emphasis; discussing some examples of these theories, he informs us that one might speak of an *atmosphere theory* and "the subtle impact of atmosphere" in shaping attitudes; explaining other situational theories, finding them very important and discussing them in a separate chapter).

122 *Id.* at 209–210 (discussing for example, the frustration theory of prejudice); 210 (discussing another type of "nature of man" theory which emphasizes the character structure of the individual person).

123 *Id.* at 210–211(discussing also theories with emphasis on earned reputation or theories of the problem of the stimulus object itself).

124 *Id.* at 211 (discussing theories which emphasize earned reputation).

emphasized that "none alone gives a complete picture."[125] In Allport's final word, he says that "[b]y far the best view to take toward this multiplicity of approaches is to admit them all."[126] Pettigrew and Tropp emphasize the need for a contextual approach, suggesting future directions for the intergroup contact theory.[127] Mayor and Vick, who reviewed the literature on the psychological impact of prejudice fifty years after Allport, summarize future directions as follows; "[t]here is no uniform response to prejudice. An important agenda for future research is to identify the personal, situational and structural antecedents of these different response to prejudice and to identify coping strategies that are most adaptive."[128]

It seems that the essence of the message of prejudice is a separation between the superior "we" and inferior "others." A group of people are considered inferior, and as such, they can not belong to the same community with "the superior ones." In the present day, it is difficult to identify and prove the prejudice especially as a legal tool. Feelings and opinions are not always expressed in words. But law has been understood primarily about acts or omissions of due actions. While neuroscientists and psychologists may be better equipped to identify the prejudice than a lawyer, a lawyer can consider how the difficulty in identifying prejudice can affect litigation and public making. Does this difficulty restrict the benefit of the use of the suggested

125 *Id.* at 202.

126 Allport, *above* note 93, at 211–212 (adding also that, "[w]e may lay it down as a general law applying to all social phenomena that multiple causation is invariably at work and nowhere is the law more clearly applicable than to prejudice.")

127 Pettigrew & Tropp, *above* note 97, at 272–273 (saying that, "[f]inally, to broaden our understanding of contact's effects, our meta-analytical results indicate the need for greater attention to the specific groups under study. We noted in Figure 16.1 that the outcomes of contact vary substantially across different intergroup contexts. In line with this view, emerging intergroup research has begun to examine the ways in which people show different emotional reactions to outgroups, depending on their perceptions of those groups and histories of relations with them (quoting other relevant studies). These perspectives suggest a need to extend Allport's approach beyond a general conceptualization of contact's effects, to examine distinct points of concern, and responses to intergroup contact across different intergroup relationships. As such, future contact research should consider the ways in which contact situations might best be tailored to accommodate the diverse concerns that are likely to be relevant when different groups come into contact.").

128 Brenda Major and S. Brooke Vick, "The Psychological Impact of Prejudice", *in On the Nature of Prejudice: Fifty Years after Allport* 151 (ed. John F. Dovidio et al., 2005) (saying that, "[i]n sum, contemporary research on targets of prejudice echoes many of the ideas Allport proposed in his classic chapter on 'traits due to victimization.' As he predicted, targets of prejudice respond in various ways motivated by their desire to protect their self-esteem and make sense if their world. There is no uniform response to prejudice. An important agenda for future research is to identify the personal, situational and structural antecedents of these different response to prejudice and to identify coping strategies that are most adaptive.").

contextual factor of prejudice as a legal tool to the clear cases in litigation? However, the majority of the cases fall in grey zones. Does this difficulty mean that whenever prejudice is a relevant contextual factor, experts are needed to solicitude the judges and the lawyers in litigation? Are there cases where the judge needs to hear testimony of the experts? Are there cases where the judge needs to defer to the legislature? Does this difficulty mean that whenever prejudice is a relevant contextual factor, experts are needed to be included or consult the policymakers? Certainly legal training itself is not sufficient to reach the level of expertise required by the complex issues of prejudice.

The overwhelming literature on prejudice by social scientists indicates the expertise required and expected to opine on the issue of prejudice. This means that the judge can not feel comfortable to proceed to judgments on prejudice with a feeling that her or his legal expertise can provide all the required expertise on identifying and understanding the harm of prejudice. However, the judge indeed needs to identify prejudice as one of the relevant contextual factors for substantive inequality/discrimination and/or in the terms of the suggested theory, *unsafe/unequal belonging*. It seems that the judiciary should, in the cases where prejudice is relevant in the judicial analysis, be consulted somehow by experts on the nature of prejudice and its effects. Public policymakers need to be consulted by social scientists too. However, at the same time these experts admit that they are still working on crucial research questions and lack answers in many important areas. This intersection of social science and law evolves into a more complicated area. For example, both the doctrine of separation of powers and the level and nature of the required expertise are important on how social scientists can influence policy-making and judicial analysis.

The establishment of the contextual factor of prejudice is suggested to establish a violation of the *right to secure belonging in a community of equals*, and *a prima facie case of a violation of the Right to Democratic Belonging*.

III. Absence of Stereotype

To feel secure in a public relationship means that every member trusts that the other members of the relationship will not treat him or her through the lens of a negative stereotype. The inquiry regarding stereotypes should be used as an analysis of a contextual factor in the judicial analysis over the identification of unequal belonging. It is thus suggested that the stereotype is a contextual factor that the judge and the policymaker should take into account in the effort to identify a secure belonging in a community of equals. In this sense, the establishment of stereotype should lead the judge to conclude that there is *a prima facie case of unequal belonging in a community*. As in the case of prejudice, social scientists provide insight regarding the meaning of stereotype and its harm.

The analysis of Supreme Court of Canada under section 15 suggests that stereotype is a contextual factor in identifying an insecure belonging. In particular, the Court finds that,

> the second way that substantive inequality – discrimination – may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group.[129]

I affirm, follow and build on this methodology and substantive analysis of the Supreme Court of Canada.

Furthermore, a stereotype has four main features and four main functions. First, the features include a cognitive process. Stereotype is a kind of a judgment made about something or someone that it/she/he has some certain characteristics. Allport emphasizes that category, cognitive organizations, linguistic label and stereotype are all aspects of a complex mental process.[130] Minow, analyzing the dilemma of difference, identifies five unstated assumptions. The first assumption she identifies is that difference is intrinsic and not a comparison.[131] As she sees, the assessment of similarities and differences is a cognitive process in organizing the world.[132] Neuroscientists have been trying to "probe the neural basis of prejudice and stereotyping in an effort to identify the processes through which the biases form, influence behavior and are regulated."[133] Thus, stereotyping is a process which takes place in our minds. Stereotyping directly conflicts with Socrates' teaching that "I know one thing; that is, I do know nothing."[134] Instead, stereotyping is a judgment based on the belief that "I do know everything." Thus, "I can judge about things and people that I think that I know about."

Second, stereotype is a rigid and generic judgment. This judgment is often a powerful conviction. It is made as a rule for a group of people or objects without individual assessments and nuanced distinctions.[135] Allport defined stereotype as follows: "[w]hether favorable or unfavorable, a stereotype is

129 *See, e.g.*, Quebec (Att'y Gen.) v. A, 2013 SCC 5, para. 201, [2013] 1 S.C.R. 61 (Can.). (per LeBel, J. (minority on section 15) writing on stereotype and quoting Withler v. Canada (Att'y Gen.), 2011 SCC 12, para. 36, [2011] 1 S.C.R. 396 (Can.).).

130 Allport, *above* note 93, at 187.

131 Minow, *above* note 96, at 53.

132 *Id.* at 54.

133 Amodio, *above* note 82.

134 Free translation of his saying in ancient Greek.

135 *See also* the etymology of the word "stereotype." It is a literal translation of the compound Greek word composed of the Greek words στέρεος [stereos] and τύπος [typos]. [Stereos] means solid and that it endures the pressure, it does not change and it is not flexible, it is rigid. [Typos] means type or, in other words, a category.

an exaggerated belief associated with a category. Its function is to justify (rationalize) our conduct in relation to that category."[136] He explains that "a stereotype is not identical with a category; it is rather a fixed ideal that accompanies the category."[137] Stereotype as a rigid assessment is not easy to be changed.

Third, stereotype is an easy judgment. People tend to feel pleasure, when they have answers for everything. They do not like or feel fear or a kind of powerlessness, when they discover that they don't have all the answers. They then oversimplify in order to feel that they conquer the truth. Among the five assumptions Minow identifies, the fifth is that "the status quo is natural, uncoerced and good."[138] As she concludes, "for the most part, unstated assumptions work in subtle and complex ways. They fill a basic human need to simplify and make our world familiar and unsurprising yet by their very

136 Allport, *above* note 93, at 187.

137 *Id.* As he goes on to explain: "[a] stereotype, then, is not a category, but often exists as a fixed mark upon the category. If I say that "All lawyers are crooked," I am expressing a stereotyped generalization about a category. The stereotype is not in itself the core of the concept. It operates, however, in such a way as to prevent differentiated thinking about the concept. The stereotype acts both as a justificatory device for categorical acceptance or rejection of a group, and as screening or selective device to maintain simplicity in perception and in thinking. Once again we point to the complicating issues of true group characteristics. A stereotype need not be altogether false. If we think of the Irish as more prone to alcoholism than, say, Jews, we are making a correct judgment in terms of probability. Yet if we say, 'Jews don't drink,' or 'the Irish are whiskey-soaked' we are manifestly exaggerating the facts, and building up an unjustified stereotype. We can distinguish between a valid generalization and a stereotype only if we have solid data concerning the existence of (the probability of) true group differences." *Id.* at 187–188.

He goes on to explain their difference with the following: "[f]or example, the category 'Negro' can be held in mind simply as a neutral, as a neutral, factual, non evaluative concept, pertaining merely to a racial stock. Stereotype enters when, and if, the initial category is freighted with 'pictures' and judgments of the Negro as musical, lazy, superstitious, or what not." *Id.* at 187; *see also id.* (reporting that Walter Lippmann wrote of stereotypes, calling simply "pictures in our heads."; reporting also that "to Mr. Lippmann goes credit for establishing the conception in modern social psychology. (W.Lippmann *Public Opinion*. New York: Harcourt, Brace, 1922)."; commenting that "[h]is treatment however excellent on the descriptive side, was somewhat loose in theory. For one thing he tends to confuse stereotype with category.").

See also Amodio, *above* note 82, at 670 (stating that "[c]onceptual attributes associated with a group and its members (often through overgeneralization,) which may refer to trait or circumstantial characteristics."). Amodio quotes S.T. Fiske as follows: "generalized characteristics ascribed to a social group, such as personal traits (for example, unintelligent) or circumstantial attributes (for example poor)."). *Id.* (quoting S. T. Fiske, *Handbook of Social Psychology: Vol. 2*, 357–411 (ed. D. Gilbert et al., 1998).

138 Minow, *above* note 96, at 70.

simplifications, assumptions exclude contrasting views."[139] It is easier to pretend that the standards of complexity guiding human judgment are lower so that we can more easily claim that we have all the relevant information and be thus able to make purportedly correct decisions.

Fourth, a stereotype is an a-contextual, unrealistic and partial judgment. It is thus a deluded judgment. It is a judgment made without an individual assessment of the person or object under the judgment.[140] As Minow identifies, the observer can see without a perspective. Minow calls to see the impartiality in legal judgments just an aspiration, not as a description.[141] She shares the view that "what interests us, given who we are and where we stand, affects our ability to perceive."[142] The fourth assumption Minow sees is that "other perspectives are irrelevant."[143] She thinks that it may be impossible to take the perspective of other people completely, but she sees that the effort to do so can help us to recognize the partiality of our view. She particularly emphasizes the need for the majority to get freed from its unstated assumptions for the viewpoints of minorities and develop a better understanding in the light of the people with less power.[144] As she states, "a perspective may go unstated because it is so powerful and pervasive that it may be presumed without defense."[145] Stereotypes are based on assumptions before and without any individual assessment of the object/subject the stereotype is about. Therefore, stereotypes are unrealistic generalizations. As Abella J., finds, "[s]tereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities."[146] In this same spirit, LeBel J., explains, "[s]uch a law will be discriminatory because it is premised upon personal traits or circumstances that do not relate to individual needs, capacities or merits."[147] "Stereotypes are inaccurate generalizations about the characteristics or attributes of members of a group[.]"[148]

139 *Id*. at 74.
140 *Id*. at 55–56; *see also* her n. 25 (referring to other scholars).
141 *Id*. at 60.
142 *Id*. at 61 n. 46
143 *Id*. at 66.
144 *Id*. at 68.
145 *Id*. at 69–70. *See also* at 70 (using a satire for an ancient person to point out a current reality, she says that Aristotle's faulty assertion that women have fewer teeth than men could have been checked and corrected. However, Aristotle did not check as he thought that he knew; citing and commenting on a statement in Bertrand Russell's *Best: Silhouettes in Satire*, ed. Robert E. Egner (New York: Mentor Books, 1980) at 200.
146 Quebec (Att'y Gen.) v. A, 2013 SCC 5, para 326, [2013] 1 S.C.R. 61 (Can.). (per Abella J. (majority on section 15)).
147 *Id*. (quoting: Law v. Canada (Min. of Emp't. & Immigration), [1999] 1 S.C.R. 497, para. 53 (Can)).
148 *Id*. at 202 (per LeBel J., quoting Réaume, *above* note 89, at 681).

The Supreme Court of Canada uses the similar, so-called "correspondence factor,"[149] not any more as a separate factor, but as a part of the contextual analysis of stereotype.[150] In particular, as the Court explains:

> it may be helpful in determining whether stereotypes exist to consider the question of the correspondence, or lack thereof, between the grounds on which the claim is based and the actual need, capacity or circumstances of the claimant or the affected group.[151]

Therefore, it is likely that stereotype includes a mismatch between the judgment under stereotype and the actual characteristics of a category of persons or objects who are stereotyped.

Then, there are four functions of the stereotype. First, it divides the world based on unrealistic premises. Stereotyping is always objectively mistaken, at

149 *Id.* at para. 206. The Court has been working on the correspondence factor since *Law* and it confirms more strongly the clarifications given 8 years after Law v. Canada (Min. of Emp't. & Immigration), [1999] 1 S.C.R. 497 (Can), in R. v. Kapp, 2008 SCC 41,[2008] 2 S.C.R. 483 (Can.). As it explains, "[i]t now seems clearer that this factor can be used to determine whether the distinction creates a disadvantage by stereotyping: *Kapp*, at para. 23."

See also, e.g, Quebec (Att'y Gen.) v. A, 2013 SCC 5, at para 206. (The Court emphasizes its understanding that "the correspondence between the ground or grounds of discrimination on which the claim is based and the actual circumstances of the claimant or the affected group " is only one of the possible contextual factors.)

See also, e.g., Quebec (Att'y Gen.) v. A, 2013 SCC 5, at para 206 (acknowledging that, in the past, some authors deplored an approach that was overly dependent on the use of the correspondence factor at the expense of other contextual factors and rejects this approach; referring to B. Ryder, C. C. Faria and E. Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 *S.C.L.R.* (2d) 103, at pp. 120–25.)

150 *See Kapp*, 2008 SCC 41, and Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396 and *Quebec (Att'y Gen.) v. A*, 2013 SCC 5 (where the Court identifies two contextual factors; the perpetuation of prejudice, disadvantage and stereotyping). The correspondence factor has been identified as a separate contextual factor in the test on the substantive discrimination in *Law*. Instead, the Court in the most recent jurisprudence still does refer to this factor, but not as a separate self-standing factor. See also *Quebec (Att'y Gen.) v. A*, 2013 SCC 5, at para. 206 (illustrating that the Court sees the corresponding factor mainly as a part of the analysis of the stereotype, as a contextual factor to identify discrimination).

151 *Quebec (Att'y Gen.) v. A*, 2013 SCC 5, at para. 203. The Court goes on to explain more reporting the following example from the jurisprudence; "[f]or example, in *M. v. H.*, the identification and rejection of certain stereotypes led the Court to declare a law under which support remedies were available only to opposite-sex spouses to be invalid. The law in question conveyed the negative stereotype that persons of the same sex were incapable of forming intimate relationships involving economic interdependence similar to those of opposite-sex couples, without regard to their actual circumstances. As a result, the impugned law violated s. 15(1)." *Id.*

least at some degree. As the judgment is based on overgeneralizations, it cannot closely match the reality. At least, such judgment has high levels of probability to be mistaken as unrealistic. Anderson emphasizes the complex way the stigmatizing biases function within the social relations. She discusses six "stigma-reinforcing cognitive biases."[152] Among these biases, is the following:

> (4) The stereotype incumbency bias inclines people to form a stereotype of an effective job-holder as having a particular ascribed identity (as of race, gender, or ethnicity) if the incumbents in that job overwhelmingly share that identity. This bias leads people to perceive individuals with that identity as "fitting in" to that job, and individuals with other identities as ill-suited to it.[153]

Furthermore, Anderson explains that stereotypes cause their own perceived confirmation in at least three ways:

> [f]irst, they selectively favor the recall of stereotype-confirming evidence. Second, they may lead stereotype holders to generate new evidence that confirms the stereotype … Third, stereotypes can be self-fulfiling prophesies, by inducing their targets to behave in ways that confirm the stereotype.[154]

The view of the world the person who is stereotyping has is thus deluded creating an arbitrarily divided world. This delusion assumes that the beauty of the world's intricacies is known, hinders and underestimates the world's real beauties.

Second, stereotype allocates power unfairly. Stereotype and its effects are unfair.[155] Stereotype disadvantages people and denies them benefits on grounds that they do not deserve. Only when one sees the function of stereotype in the social relations can one understand the relational disadvantage the stereotype causes. Stereotyping can create hierarchies and arbitrary inequalities. It is thus one way that to create or increase a risk of domination within social relations and even a risk of conflict and violence. Under such conditions, the people who are stereotyped cannot feel having a secure belonging in a public relationship, even in a physical way sometimes.

152 Anderson, *above* note 95, at 46.
153 *Id.*
154 *Id.* at 55.
155 *See* Quebec (Att'y Gen.) v. A, 2013 SCC 5, para 201, [2013] 1 S.C.R. 61 (Can.) (explaining that, "[l]aws premised on an inaccurate characterization of an individual or group on grounds that are unacceptable under s. 15(1) thus become arbitrary themselves: see, inter alia, Moreau, "The Wrongs of Unequal Treatment" 54/3 U.T.L.J. 291 (2004), at p. 298.").

Many scholars reach similar conclusions. Minow, having identified the five assumptions in the dilemma of difference, finds that one of the effects of the usually unstated assumptions contributes to the allocation of power as a matter of discretion.[156] Minow is right to identify the above five assumptions and to see these assumptions as a part of a system of allocating the power between the norm and the non-norm. In the same spirit, Denise Réaume finds that stereotypes "can usually be traced back to a time when social relations were based more overtly on contempt for the moral worth of the group."[157] She also explains that "inaccurate assumptions and stereotypes about the capacities, needs, or desires of members of a particular group can carry forward ancient connotations of second class status, even if the legislators did not intend that meaning."[158] Anderson also identifies "the power bias." This bias, as she explains, "inclines people in positions of power to stereotype their subordinates and to actively maintain these stereotypes."[159] Stereotype therefore creates a disadvantage in the access to benefits or opportunities. When these are denied on the basis of false views on group characteristics, stereotype sends the general message that the members of this group are morally less worthy than others. If the particular stereotype functions in that way, it creates unequal belonging. It demeans secure belonging, and it may also violate equal respect.[160]

Third, stereotype makes people less social, and instead more selfish and proud in the sense of arrogance. Stereotyping is selectively antisocial and non interactive. It is thus selectively isolating. The second assumption with the dilemma of difference identified by Minow is that "the norm needs not be stated."[161] As she states, making explicit the unstated point of reference is the first step in addressing this problem.[162] Leaving an assumption unstated, this assumption goes unchecked. To check the assumption, people have to enter in a social interaction or, in other words, in a relationship with people with contrasting views. Stereotype prevents this social interaction. Furthermore, Anderson identifies and explains, among other biases, the following:

156 Minow, *above* note 96, at 78 .

157 *Quebec (Att'y Gen.) v. A*, 2013 SCC 5, at para 202, (Per LeBel J., quoting Réaume, *above* note 89, at 681–682).

158 *Id*. As Réaume says: "[t]o be denied access to benefits or opportunities available to others on the basis of the false view that because of certain attributes members of one's group are less worthy of those benefits or less capable of taking up those opportunities can scarcely fail to be experienced as demeaning because it *is* demeaning. The message such legislation sends is that members of this group are inferior or less capable, and such a message is likely, in turn, to reinforce social attitudes attributing false inferiority to the group." [Emphasis in original; pp. 681–682.] *Id*.

159 Anderson, *above* note 95, at 46 (identifying and explaining the fifth stigma bias).

160 *See* Réaume, *above* note 89, at 681–682 (stating that stereotype violates dignity), quoted by the Court.

161 Minow, *above* note 96, at 56.

162 *Id*. at 60.

> (1) Intergroup favoritism or ethnocentrism is the bias people have in favor of members of groups in which they belong. This leads people to attribute positive behaviors of in-group members dispositionally, and negative behaviors situationally, while reversing these attributions for out-group members. (2) The shared reality bias leads individuals to align their perceptions and judgments with those of ingroup members, especially if the group is based on personal affiliation. (3) The illusory correlation bias disposes people to form stereotypes about a group with which they have little contact on the basis of unusual events, such as sensational crimes, connected to that group.[163]

Through the lens of the above bias as identified by Anderson, people can be made more interactive with others to whom they attribute the positive characteristics and avoid people to whom they attribute the negative characteristics. Furthermore, as we have seen in identifying Minow's assumptions, the test is then based on the "discovery" that "differences arise in relationships and in contexts." This discovery judgment is more likely to come closer to the reality and fairness. Consequently, the test calls for a more interactive than passive judgment. People are called to approach others, ask their opinions, and try to understand their feelings. People are called to check or in some circumstances, to wait for the truth to be experienced in the reality of their relationships. It is a potentially radical call if one is willing to see how much of the human – let's say habits and relationships – this "discovery" insights.

Fourth, and related to the above functions and features, stereotype hinders a process of change. With the conviction that the world is just, known and unsurprising, one does not see the need for change. Thus, stereotype contributes to the status quo of social hierarchies. Anderson explains this preservation of status quo as follows;

> (6) Finally, the system justification bias inclines people to interpret their social world as just, because the thought of living in an unjust world is untolerable. This bias leads individuals to make favorable attributions (dispositional attributions of good behavior and conditions, situational of bad) of high-status people and negative attributions (the reverse) of low status people.[164]

If the view of the world is that everyone has what one deserves, then, there is no need for change. Minow also finds that by stating the assumptions that have gone unstated, one opens room for debate and for new kinds of solutions. Discovering that differences arise in relationships and through contexts can

163 Anderson, *above* note 95, at 46 (identifying and explaining the first three stigma bias).

164 *Id.* (identifying and explaining the sixth stigma bias).

introduce new angles of vision and new possibilities for change.[165] If one cannot see the need for change, it is certain that there will be no effort for change, and the status quo will continue to stand unchallenged. People who are oppressed within this status quo would feel that they do not belong in a community of equals and that there is little perspective to change their belonging.

More recently, the theory of stereotype threat explains the effect of a threatening situation for stereotyping one's performance. Steele, the psychologist who first suggested this theory, explains that the stereotype threat

> can be thought of as a specific instance of a more general threat – that of being judged and treated negatively by others. One implication of stereotype threat research is that this general threat may play a bigger role in human social behavior than we've appreciated. The capacity to sense threat of this sort arises from our intersubjective capacity. To communicate effectively, we have a sense of what others could be thinking and how they might react to what we say or do, as well as to features and events in the world around us. We need ongoing theories of other people's minds, and these theories influence how we think and behave. Stereotype threat arises when, because of circumstances and signaling cues, we could reasonably theorize that other people could see it stereotypically. The situation relevance of the stereotype increases our subjective sense that we could be judged negatively (in terms of the stereotype).[166]

In the same spirit, other psychologists working on the theory of stereotype threat report its far reaching effects. Toni Schmader and Sian Beilock stress that the effect on our thoughts and behavior can be unconscious.[167] As they say, it can "affect performance – often for the worse but, sometimes, even for the better."[168] They also report that the effort one makes under stereotype threat is "not purely a function of controlled processing."[169] It is when "errors

165 Minow, *above* note 96, at 78.*See also* at the same page (identifying the fifth assumption and stating that "by their very simplifications, assumptions exclude contrasting views.").

166 Claude M. Steele, "Conclusion: Extending and Applying Stereotype Threat Research: A Brief Essay" *in Stereotype Threat: Theory, Process, and Application* 298 (ed. Michael Inzlicht and Toni Schmader, 2012).

167 Toni Schmader and Sian Beilock, "An Integration of Processes that Underlie Stereotype Threat" *in Stereotype Threat: Theory, Process, and Application* 38 (ed. Michael Inzlicht and Toni Schmader, 2012) (explaining that "[s]tereotype threat can affect our thoughts and behavior via automatic processes that run largely outside conscious awareness.").

168 *Id.* (stating that "[t]he automatic processes that negative self-relevant stereotypes set in motion are accompanied by a number of controlled processes that can, in turn, affect performance – often for the worse but, sometimes, even for the better.").

169 *Id.* at 39 (stating that "[i]n sum, stereotype threat enhances one's motivation to do well, but effort is not purely a function of controlled processing. Arousal or increased drive cues prepotent responses in a fairly automatic way.")

are identified" that "the motivation to disconfirm the stereotype can cue more controlled attempts to correct one's mistake."[170] Thus, stereotyping is not always an act under our self-control. Say you really want to be a human rights and non-discrimination activist. This does not guarantee that you are and you do not actually discriminate in practice.

Michael Inzlicht, Alexa M. Tullett, and Jennifer N. Gutsell suggest the spillover effect of the stereotype threat. They present the short- and long-term effects of coping with threats to social identity from "the powerful experience of prejudice." They explain that short-term effects of spillover include "aggression, risky decision-making, and overreacting." Long-term effects, include "both physical health problems like obesity and hypertension, as well as, mental health issues, such a depression and anxiety."[171] Thus, the effects of stereotype can be broader than they seem to be.

Stereotype, like prejudice, is not necessarily intentional. Even if there is no overt hostility or intention, stereotype may still exist. The Supreme Court of Canada has explicitly recognized this.[172] Furthermore, psychologists report that "many of the processes instigated by being the target of negative stereotypes happen automatically, outside of conscious awareness, and result in outcomes in direct opposition to the person's explicit goals and intentions."[173] Psychologists explain that the stereotype threat is triggered from "persons and/or situational factors."[174] Anderson also understands that "cognitive biases typically operate behind people's backs."[175] However, the acknowledgment that stereotypes can be used even without intention may more often

170 *Id.* (stating that "[b]ut when errors are identified, the motivation to disconfirm the stereotype can cue more controlled attempts to correct one's mistake.").

171 Inzlicht et al., *above* note 83, at 107, the abstract.

172 *See, e.g, Quebec (Att'y Gen.) v. A*, 2013 SCC 5, at para 202 (quoting Réaume's understanding that the stereotype can exist "even if the legislators did not intend that meaning). Reaume explains: "[t]he overt hostility may have come to be washed out of the picture with the passage of time or the 'normalization' of such attitudes, but the implication that those to whom the stereotype applies are less worthy than others remains. Once this construction of a group has set in, others are likely to treat members of that group disadvantageously out of an honest belief that this merely reflects their just deserts or even simply because that is how everyone treats them, without ever thinking about the insult involved. They may even understand their conduct, as with certain traditional sexist practices, as a positive effort to accommodate the 'natural weaknesses' of the stereotyped group. However, neither the absence of contempt as a subjective matter nor well-meaning paternalism prevents the use of stereotype from violating dignity." *Id.*

173 Schmader & Beilock, *above* note 167, at 36.

174 *Id.* generally. *See* at 36 (using the specific phrase explaining "Figure 3.1: Stereotype threat as a cognitive imbalance triggered by person and/or situation factors. Adapted from Schmader, T., Johns, M., & Forbes, C. (2008). An integrated process model of stereotype threat effects on performance. Psychological Review, 115, 336–356," used by Schmader & Beilock, *above* note 167, with permission of the publisher.).

175 Anderson, *above* note 95, at 49–50 (stating that this "does not entail that there is nothing people can do to block or override their operation.").

trigger a cautiousness and self-examination in individuals, while it calls the judiciary for adopting a more effects based approach to do justice.

Like prejudice, stereotype also requires a contextual identification and assessment. The Supreme Court of Canada has been trying to analyze stereotype through a contextual approach, at least since *Andrews*. Psychologists also suggest that the analysis of stereotype is contextual. As the Multi-Threat Framework suggests, "there is not a single, simple intervention: Qualitatively different interventions will need to target the different factors that elicit each of the stereotype threats or the different mechanisms that underlie each of the stereotype threats."[176]

For example, Christina Logel, Jennifer Peach and Steven J. Spencer propose that there "might be important differences in people's experience of stereotype threat depending on the group to which they belong, and on the nature of the stereotypes that apply to their group."[177] Assessing stereotype in a relationship means that one assesses the experience within this relationship. This is a situational analysis that considers the participants in the relationship, their feelings, behaviors, their context and generally the way they belong within the particular relationship. Thus, assessing whether a relationship is free from stereotype and – in this sense secure and safe – is necessarily a contextual inquiry.

It seems again that social scientists have much to say on the nature of stereotype and its effects. They consequently have much to say on the nature of the harm of the stereotype and how to remedy it. The legal training is not enough by itself to capture the complexity of the phenomenon of stereotype. However, the contextual factor of stereotype is indeed relevant to help the judge identify a secure/safe belonging in a community of equals.

Therefore, the argument in this section can be summarized as follows. First, the contextual factor of stereotype is linked to the *right to secure belonging in a community of equals*. In particular, stereotype indicates violation of the *right to*

As she goes on to say: "[c]ognitive biases tend to kick in when people need to make decisions under time pressure, when they are tired, distracted, cognitively overloaded, or under stress, and when a nondiscriminatory rationale for their decision is readily available. They are better able to consciously check their biases when they know they are being observed, are held accountable for their decisions, are reminded of nondiscrimination norms, are given ample time to deliberate, and make evaluations on the basis of objectively measured criteria rather than subjective impressions. In addition, racial integration under certain conditions can also be an effective tool for reducing cognitive bias." *Id.* at 50.

176 Jenessa R. Shapiro, "Types of Threats: From Stereotype Threat to Stereotype Threats" *in Stereotype Threat: Theory, Process, and Application* 84 (ed. Michael Inzlicht and Toni Schmader, 2012).

177 Christina Logel, Jennifer Peach and Steven J. Spencer, "Threatening Gender and Race: Different Manifestations of Stereotype Threat" *in Stereotype Threat: Theory, Process, and Application* 159, the abstract (ed. Michael Inzlicht and Toni Schmader, 2012) (suggesting "a modern version of W. E. B. Du Bois' 'double consciousness'" and that "the experience of stereotype threat may differ depending on how motivated group members are to avoid the stereotype, and how vigilant they are for signs that they may be judged in light of a negative stereotype.").

secure belonging in a community of equals and a *prima facie violation of the right to democratic belonging*. Second, four features and four functions of stereotype have been identified. Stereotype is a cognitive process. It has also the following characteristics: it is a judgment which is simplistic, rigid, a-contextual and unrealistic. Stereotype functions to divide the world on unrealistic premises. It allocates power unfairly, it makes the people less socially interactive but selfish and arrogant, and it hinders the process of social change. Identifying the above features and functions, we have seen that social scientists are the experts to explain the complex forms and effects of stereotype. It is, thus, suggested that the contextual factor of stereotype cannot be fully or primarily analyzed by a judge who is not consulted somehow by social science. However, the experts are still working on their research questions.[178] The judicial task, the policy-making, and generally any relevant decision-making should be therefore informed by the connection of the stereotype to the secure belonging and by what the experts say on their research on stereotype and its harm.

IV. Non Dominance and Perpetuation of Disadvantage

To feel secure in a relationship means that every member trusts the other members of the relationship that they will not dominate him/her. Perpetuating and/or worsening a pre-existing disadvantage may enhance the risk of domination. Then, the belonging of this person cannot be a secure belonging in a community of equals. This, in turn, enhances the sense of not being secure in the relationship. It is suggested that perpetuation and/or a worsening of a pre-existing disadvantage is a relevant contextual factor to identify an unsafe/insecure belonging.

As has already been explained,[179] Canadian judges have been using the perpetuation of a disadvantage as a contextual factor to identity substantive inequality/discrimination under section 15. One example of an unintentional perpetuation of a historical disadvantage based on marital status was acknowledged in *Quebec*. The majority of the Justices considered the perpetuation of a pre-existing disadvantage as the relevant contextual factor for identifying substantive inequality/discrimination.[180] All the majority Justices who considered

178 *See, e.g., generally Stereotype Threat: Theory, Process, and Application* (ed. Michael Inzlicht and Toni Schmader, 2012) (calling for future research).

179 Section I of this Chapter.

180 Quebec (Att'y Gen.) v. A, 2013 SCC 5, para. 427 [2013] 1 S.C.R. 61 (Can.) (Chief Justice looks at the reasonable person in the claimant's situation and she concludes that the law perpetuates a pre-existing disadvantage. She explains the pre-existing disadvantage of the claimant's group. In particular, first, she explains that it was a discriminatory legislative animus underlying measures prohibiting *de facto* spouses from contractually agreeing to obligations stemming from their relationships and by de-legitimizing their offspring. Looking then at the present day conditions, she states that "[w]hile the legislative animus that underlay those measures has disappeared, the present law continues to exclude *de facto* spouses from the protective schemes of Quebec family law." She thus looks at the past and

the historical disadvantage as the relevant contextual factor viewed that the perpetuation of disadvantage is not necessarily intentional.[181] As Abella J., said in *Quebec*,

> [t]he root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. As the U.S. Supreme Court warned in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):
>
> … practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[182]

Thus, upon Abella J.'s understanding, the exclusion, which "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it" is discriminatory. Widening the gap between the

the present situation of the group of the claimant. She finds that the law in past was intentionally discriminatory. She also finds that while there is a discriminatory animus in the present law, the effect is a continuation of exclusion of the de facto spouses from the protective schemes of Quebec family law. However, she concluded, in the second stage of the analysis, that this is justified in a democratic society.)

See also at para. 325, (Abella J., dissenting also viewed the case as a case of a perpetuation of a historical disadvantage against *de facto* spouses, quoting also Sophia Moreau, "R. v. Kapp: New Directions for Section 15" 40 Ottawa L. Rev. 283, 292 (2008–2009).).

See also at para. 385. (Deschamps, Cromwell and Karakatsanis JJ., dissenting in part in the result, concluding too that "the exclusion of *de facto* spouses from the protections provided for in the *C.C.Q.* perpetuates a historical disadvantage, Withler v. Canada (Attorney General), 2011 SCC 12, paras. 3, 35, 37 and 54). [2011] 1 S.C.R. 396").

But see also at 3, (LeBel J., writing for Fish, Rothstein and Moldaver JJ, concurring in result and being the minority view on section 15 of the Charter. In contrary to the majority of the Court, he did not find the distinction discriminatory). In particular, he reviewed the history of the distinction and he found that there is no discrimination. Focusing more on the disadvantage of prejudice and stereotype, and dignity (quoting extensively Réaume), he finds that the disadvantage imposed was not such as to be discriminatory. He thus did not find that there was a prima facie violation of section 15 and for this reason did not find it necessary to proceed to any analysis of section 1 of the Charter.).

181 *Id.* at para. 427 (Chief Justice applying an effects based analysis). *See also* at 425–426 (Chief Justice's disagreement with the intentional historical analysis by LeBel J.). *See also* at 385 (three Justices dissenting in part in result, explaining that there was a perpetuation of historical disadvantage, even if the stigmatizing intention does not exist.). *See also* at 328 (Abella J., dissenting in result, stating that "it is the discriminatory conduct that s. 15 seeks to prevent, not the underlying attitude or motive[.]").

182 *Id.* at para. 332 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

disadvantaged group and the rest of the society renders the participation of this group in a supposed society of equals unsafe.

Kapp,[183] as it has been already described, was an affirmative action case decided under section 15(2). The program was analyzed in relation to a historical disadvantage based on race. The Court stresses that sections 15(1) and (2) work together to realize substantive equality.[184] As the Court said:

> [s]ections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). This is made apparent by the existence of s. 15(2). Thus, s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.[185]

It seems that it is easier to see why a perpetuation of a disadvantage can establish a prima facie violation of the *right to a secure belonging*, providing brief explanations of why the perpetuation and/or the worsening of a disadvantage rooted in history, socioeconomic and systemic political disadvantage can violate the *right to equal belonging*. The distinction among the socioeconomic, political and the disadvantage rooted in history serves analytical reasons of clarity and does not imply that these disadvantages cannot coexist. Instead, such disadvantages can cluster each other in many circumstances. Analyzing these types of disadvantage separately does, however, mean that some special issues arise in each case.

i. Disadvantages Rooted in History

Disadvantages rooted in history present a particularity mainly because of the element of time. Focusing specifically on disadvantages based on race or ethnic origin, the reflections here suggest the particularity of an inequality rooted in history. Some disadvantages rooted in history are and should be "buried in history."[186] Some still and should matter. For those disadvantages that still have an importance, the injustice is ongoing. In particular, the passage of time

183 R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483 (Can.).
184 *Id.* at para.16.
185 *Id.*
186 Borrowing the term by Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* 69 (2002).

makes the injustice deeper in three ways in terms of its consequences: (a) the primary trauma becomes chronic; (b) the primary trauma causes secondary traumas on the primary victim; (c) the primary trauma causes new traumas to new victims. A perpetuation of such disadvantage is one of the most brutal injustices violating clearly the secure belonging in the society.

Janna Thomson calls for taking responsibility for the past through reparations for historical injustices.[187] She sees "a moral relationship among the generations" and "transgenerational responsibilities."[188] Thomson views the world built on moral relationships between the generations and relationships among the nations and persons. In her view, citizens have responsibilities and duties[189] stemming from a transgenerational community with moral commitments.[190] She considers the reparation as reconciliation based on a conception of a society as an intergenerational community, suggesting a theory of reparation that focuses on repair of relationships.[191] She then develops the idea of the participants in a transgenerational relationship, where obligations are inherently passed down.[192] In this understanding, one can be responsible for reparation, whether culpable or not.[193] She embraces the view that the beneficiaries of the injustices have a duty to repair the injuries suffered by the victims.[194] She sees that this claim is best understood as compensation for unfair disadvantage and not a reason to blame for the past-sharing of the benefit.[195] Instead, Thompson finds that this responsibility is best understood as "a compensation for unfair disadvantage – not reparation for wrong done."[196] Blood lines are irrelevant.[197] Duties of citizenship are not dependent on ancestry nor do they impose guilt, but responsibilities.[198]

187 *See generally,id.*

188 *Id.* at 37. As she goes on to say talking about the "diachronic approach" she adopts: "[i]t draws attention to the importance of the transgenerational relationships and the obligations and entitlements associated with them. This study has investigated some of these obligations and entitlements. It thus contributes to an appreciation of the partnership between generations as a moral relationship that requires us to take responsibility for our nation's past as well as making provisions for its future." *Id.* at 153.

189 *Id.* at 35–36.

190 *Id.* at 28, 37.

191 *Id.* at 85.

192 *Id.* at 15–18.

193 *Id.* at 46.

194 *Id.* at 9 (sharing this claim with Bigelow, Paegetter, Young).

195 *Id.* at 9–10 (discussing the two interpretations of the claim over a duty to repair the injuries suffered by the victims; the unjust enrichment argument and the compensation of unfair disadvantage argument. *See also* at 10, note 14, where she goes on to explain that it seems to her that "most discussions run together the two interpretations," referring to Bigelow, Paegetter, Young).

196 *Id.* at 10.

197 *Id.* at 36.

198 *Id.*

The aim of Thompson's approach is to repair relations damaged by injustice and not to return to the previous situation.[199] She adopts an obligation-dependent reconciliatory approach where the predecessor had an obligation to remedy the injustice.[200] She shares the view that "[a]cts of injustice morally require a response that enables perpetrators and victims to reestablish relations of respect."[201] Thomson is concerned with the specific form of reparation to undo past injustices of not only dispossession but also discrimination.[202] Her aim is to restore relationships in the present and the future.

To develop her reconciliation approach, Thompson distinguishes different types of injustices and the nature of the harm of each injustice. She is concerned about historical responsibilities, both those which involve the right of possession and those which do not involve such a right.[203] She distinguishes the cases of unjust dispossession or other violations concerning property, and injustices like murder, torture, enslavement, discrimination and denigration. Thompson says that the latter are "injustices that may in fact loom larger in the minds of the victims or their descendants[.]"[204] She is looking for a theory of historical obligations which is able to encompass the demands of the injustices beyond broken treaties.[205] In other words, she identifies the injustice which needs to be remedied each time.

Thompson discusses the example of the removal cases and she explains the nature of the harm of this injustice. She finds that this is a harm which falls within the notion of "harm in family lines."[206] As she explains:

> [i]f descendants of those who were removed from their family and culture are never accepted or treated as equals in mainstream society – as so often happened to Aborigines – then their lack of a connection to the culture and community of their forebears makes them especially vulnerable and insecure. They lack a proper place in the world. As members of family lines, they have been wronged by the injustice.[207]

One can see that Thompson explores the nature of harm in this case. She appeals to a kind of unequal belonging of a little community of Aboriginal cultures, which affects their belonging in a larger societal community.

Furthermore, Thompson wonders: "[w]hat reparation can black Americans legitimately demand?"[208] As Thompson explains:

199 *Id.* at 7.
200 *Id.* at 37.
201 *Id.* at 35 (sharing the view with Boxil).
202 *Id.* at 101–102.
203 *Id.* at xiii.
204 *Id.* at xiv.
205 *Id.* at 23.
206 *Id.* at 130–147.
207 *Id.* at 136.
208 *Id.* at 140.

> [i]n other words, injuries to memories and self esteem, and at least some part of the consequences of these injuries, can be blamed on a history of injustices which destroyed the heritage of African American families and ended them an opportunity to regain it or to establish a sound basis for an identity as Americans. It is for the harms caused by this history that presently existing black Americans deserve reparation. Slavery is relevant to their case for reparation.[209]

Thompson again explains the nature of harm. She appeals to some kind of stigmatized belonging in a little community of African-Americans, which leads to unequal belonging in the larger societal community.

Thompson also distinguishes harms caused by injustices to family lines and harms caused by wrongs to individuals.[210] She thus again calls us to look at the nature of the injustice and the harm to find the appropriate remedies. This is an orthodox analytical direction, useful to find answers for competing claims of various minority groups.[211]

209 *Id.*

210 *Id.* at 144–145. As she says: "harms caused by injustices to family lines are likely to be more serious than harms caused by wrongs to individuals. American blacks do not suffer merely from economic disadvantages relative to whites, but also from a loss of heritage and the lack of a source of positive identification. As a result, they are more likely to regard themselves as marginal, disregarded members of American society. Because of a history of injustices (Robinson claims), blacks are likely to be alienated from the political process, skeptical about their role in American life, and disappearing about the future of themselves and their children. Giving priority to removing black disadvantage would help to undo these harms by demonstrating a national determination to overcome the past and include African Americans as equal citizens – which is what reparation as reconciliation requires. … By taking into account the existence and degree of harm to individuals as members of family lines, and what is required to bring about reconciliation between those wronged and their nation, we can justify signing out people of a certain kind and giving them priority as our first step in making society more equitable for everyone. In particular, we can justify programs that give priority to members of disadvantaged African-American families. One of the objections to reverse discrimination has been answered. This does not mean that giving black Americans special advantages in competitions for jobs or university places is the best way of alleviating harms done to black families. Other objections to reverse discrimination, as it has been practiced, need to be answered. Programmes of other kinds may be better means of overcoming disadvantages – particularly of those black families whose members are not in a position to take advantage of reverse discrimination policies. The question of what exactly should be done to repair harm done to family lines is not answered by this investigation. What it has been established is that there is no incompatibility between the requirements of equity and the demands of reparative justice. In the framework of a reconciliatory approach to reparation, they remain distinct, but do not come into conflict.".

211 For instance, one could see that the explanations over the harm to African-Americans can contribute to an answer to challenges of affirmative action programmes for African-Americans by other minority and/or disadvantaged groups in the United States, *e.g.*, Asian Americans.

Thompson's reconciliatory approach leaves some claims to historical title/injustices to be buried in the history. These are the injustices, which have been superseded by recent positive developments.[212] Memory is seen as a portion of identity of individuals and communities.[213] As such, it deserves respect.[214] Thompson calls for respecting memory in a backward-looking approach with forward-looking elements. Her approach considers the past in promoting justice for the present and future. In her approach, justice is the specific remedy to a specific harm and it responds only to those injustices where negative effects have not been superseded by positive developments.

I find Thompson's understanding to be right. In her view, the harm of the historical injustice was done to the individuals not to the groups.[215] Her approach is influential to the suggested analysis to the following extent: that she suggests a theory of collective responsibility, which focuses more on the nature of harm on the victims through generations, and that this harm itself is the ground for claiming remedy and responsibility for the past. Thompson rightly sees that the responsibility for the past is not a mere blaming of the beneficiaries of the younger generations. Instead, because one can be responsible for reparations without culpability, Thompson promotes objective responsibility. Thompson rightfully argues that reparations are proper and that equity is not incompatible with reparations.

Being "debtor" is not always blame worthy. It is because the harm is still alive, that there is responsibility. This responsibility is rooted in the past, but it serves for the present and the future. There is an ongoing injustice, because the harm is still alive. There, the good of justice is continually disturbed. The good has not been left to reach "a state of peace." The conflict and the violation of justice is ongoing. The consequences of the harm are spread through generations, adding new victims. It can be seen again that the harm has spill over effects, and it constitutes a disadvantage which is "corrosive."

The term "corrosive disadvantage" is borrowed by Jonathan Wolff and Avner de-Shalit[216] and is used in the same sense. They call "fertile functioning" the functioning that spreads its good effects over several categories of functionings, either directly or by reducing risk to the other functionings. Their idea of fertile functioning cannot be explained in isolation from their idea of "corrosive disadvantage." The main thrust of their argument is that in order to decluster disadvantage, governments ought to attend to corrosive disadvantages and fertile functionings.[217] They call "corrosive disadvantage" the sort of disadvantage that has negative effects on other functionings. They find that such disadvantage can also be dynamic and that it is often

212 Thompson, *above* note 186, at 69.
213 *Id.* at 66.
214 *Id.* at 69.
215 *Id.* at 103.
216 Jonathan Wolff and Avner de-Shalit, *Disadvantage* (2007).
217 *Id.* at 153.

transgenerational as well.[218] "Disadvantage" is considered to be the lack of genuine opportunities for secure functionings. They thus introduce a notion of a disadvantage involving insecurity of functionings and lacking genuine opportunities for secure functionings. Being disadvantaged is defined in terms of low or insecure functioning.[219] They see education falling potentially in the category of the fertile functionings. In particular, they conclude that lacking education is always a very corrosive disadvantage.[220] They find, however, that its fertility appears to be much more context dependent.[221] A society which has successfully declustered disadvantage by securing fertile functionings and reducing corrosive disadvantages would be, in their terms, a society of greater equality, or at least, one closer to that ideal.

The perpetuation of a disadvantage which is rooted in history and still matters in the societies is sending to all the victims a message of an intergenerational non belonging in a community of equals. It sends the message that "neither you, nor your predecessors have been a full part of this community." "You have never belonged in the community of equals." It is only when we take responsibility for the past and agree to start a new project of living together and sharing, that a healthier relationship can emerge. The rule of *ubi ius ibi remedium* has stood since ancient years. Appropriate responses to injustices which are rooted in history and matter for the present are necessary to remedy the inequality which is caused by the injustice. For this, a comprehensive theory for historical disadvantage is needed. This is beyond the scope of my book. However, I can close this subsection with the additional following reflections.

Official acknowledgements and apologies may be parts of the process of the healing of a trauma from a historical injustice. But the healing needs positive actions. New positive experiences are needed to heal the trauma. Otherwise, the past stands as a threat and a source of "bleeding," sending the message of non belonging in a community of equals. It stands as a source of distrust, which the present has not yet challenged or remedied. Conscious or unconscious suspicions come from the past to the present. In this case, people need more security guarantees for the trust to be built in the present and future.

Then, healing always takes time. And then, the meta-traumatic period should be handled with caution for permanently healing the trauma. Cases of revival of a trauma on the primary and new victims cannot be excluded. A new era of justice can only start when victims of disadvantage which is rooted in history have such positive experiences that their narratives change. A new era starts when their narratives stop having an emotional reference to the injustices rooted in the past, which still disadvantage unfairly the lives of the people. It is only then that their traumas cease restricting building inclusive, trustworthy

218 *Id.* at 121.
219 *Id.* at 183.
220 *Id.* at 144.
221 *Id.*

and just societies. It is only then that people can start feeling having a secure and equal belonging in our societies.

ii. Socioeconomic Disadvantage

A socioeconomic disadvantage hinders the power of the people to have genuine opportunities. In some instances, it violates directly human dignity and basic human respect. Human dignity is the most basic form of equality among the people. Indeed, human dignity is sometimes too vague in legal analysis. However, human dignity can enhance philosophically the legal debate in its applied forms such as human respect and non domination. A perpetuation of a socioeconomic disadvantage enhances the risk that people may be dominated by others. It enhances the risk that people may lose control of their environment. If one is rendered homeless, any discussion about genuine opportunities of education may seem entirely out of the point. Instead, the point is that this person needs first to eat and sleep in a warm place. How can a homeless person feel that she/he belongs in the society? Certainly, not in a secure way, in the most basic level.

iii. Systemic Political Disadvantage

The perpetuation and/or worsening of systemic political disadvantage is a contextual factor which proves a violation of secure and thus equal belonging in society. This section relates both to the previous section on systemic political disadvantage,[222]as well as, the participatory element of the democratic society analyzed in more detail in Chapter 2.[223] As has been explained, systemic political disadvantage is an institutionalized disadvantage of political power which leads to permanent or frequent losers, independently from the content of their ideas. Recall the continuum of the relationships of political interaction suggested in Section I of this Chapter. I talk about a disadvantage which finds itself in certain kinds of political relationships. These relationships fall within the range between the tyranny of the majority (of the institutionalized powerful political players) and the institutionalized courage to dissent (of the institutionalized and systemically powerless political players). A perpetuation and/or worsening of such disadvantage enhances the risk for economic, social and political domination. Perpetuation and/or worsening of a pre-existing disadvantage enhances the unsafe and insecure and, thus, the unequal belonging in a community of equals.

After the above brief explanations, it is easier to see that the perpetuation and/or worsening of the pre-existing disadvantage may render the belonging of already disadvantaged people even more unsafe, insecure and thus unequal. It enhances the risk of being dominated by other people. Especially the

222 *See* section I of this chapter.
223 *See* Chapter 2.

worsening of the pre-existing disadvantage causes an even deeper risk of domination by others. It thus violates the freedom to self rule, self development, self identification and finally human dignity. This is the *minimum content of the Right to Democratic Belonging*.[224] This is a violation of equal respect and human dignity specifically through a violation of the *rights to equal and democratic belonging*. Even if when the pre-existing disadvantage is not one which already demeans equal belonging in the society, the perpetuation/worsening of such pre-existing disadvantage may result to a disadvantage which demeans the secure and equal belonging in the society. The perpetuation of a pre-existing disadvantage is very likely to put the people who face a pre-existing disadvantage in such a place in the society that they can very reasonably feel that they don't belong with security in a community of equals. These people face a high risk and vulnerability of being dominated by others.

V. Other Disadvantages which Violate Secure Belonging in a Community of Equals

The list of the contextual factors listed above is not exhaustive, nor does it suggest that all the above identified contextual factors will be always relevant. Other contextual factors next to the systemic political disadvantage, prejudice, stereotype and perpetuation and/or worsening of pre-existing disadvantage may be added and be more relevant in certain circumstances. This is in line with the approach of the Supreme Court of Canada, which uses the contextual factors of prejudice, stereotype and perpetuation of a pre-existing disadvantage in a non exhaustive list. Instead, for the Court, they are some potential indicators to establish a prima facie violation of the equality rights under section 15.[225] The difficulty to propose other analogous contextual factors is to find what the agreed relevant contextual factors share with each other. What the absence of a systemic political disadvantage, the absence of prejudice and stereotype, and absence of perpetuation and/or worsening of a pre-existing disadvantage share is the right to enjoy a secure membership in a participatory community of equals, or in other words, a democratic society. An establishment of any contextual factor which refers to a disadvantage which demean secure belonging in a community of equals can establish a *prima facie violation of the Right to Democratic Belonging*.

As I have already mentioned, Sheppard has already proposed the enrichment of the Canadian test with more contextual factors, including "an explicit assessment of structures, systems, relations, and processes of exclusion."[226] In

224 *See* more on *the minimum content of the Right to Democratic Belonging* in Chapter 7.

225 *e.g., Kapp*, 2008 SCC 41, paras 18–23 (Can.); Law v Canada (Minister of Employment and Immigration) [1999] 1 S. C. R. 497 (Can.); Withler v. Canada (Att'y Gen.), 2011 SCC 12, [2011] 1 S.C.R. 396 (Can.); Quebec (Att'y Gen.) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61 (Can.).

226 Sheppard, *above* note 45, at 63–64.

particular, she suggested that the contextual factors should be reframed in three directions: First, she suggests that the test should include various "Types of Harmful Effects." She suggests that this should include the following: (1) Economic exclusion or disadvantage; (2) Social exclusion from important non-material components of social life (e.g. work, education, culture); (3) Psychological harms to dignity, respect, integrity, identity; (4) Physical harms to bodily integrity, security, health and well-being and (5) Political exclusion.[227] I find that she sees a sufficiently broad range of types of harms that can establish prima facie violation and indicate a violation of the equality rights under section 15.

Second, she suggests that the contextual factors should include a "Degree of Harm." She understands this as "An assessment of the degree or extent of harm."[228] She sees that the degrees can be "relatively minor infringements to significant or major encroachments on economic, social, psychological, physical, political well-being."[229] She suggests a sufficiently broad scale of degrees of the harm which can indicate violation of the equality rights. It seems that Sheppard's reasoning includes in the definition of the equality rights considerations upon proportionality of the harm.

Third, Sheppard suggests that the contextual factors should include "Exclusionary Processes and Structural/Systemic Dimensions of Harm." She includes in this the following: (1) Pre-existing disadvantage; (2) Reinforcement of disadvantage, vulnerability, harmful dependencies; (3) Exclusion from decision-making processes; (4) Absence of democratic participation; (5) Absence of consultation; (6) Access to justice, institutions, processes, and (7) Failure to investigate possibilities of accommodation. She sees again a sufficiently broad range of systemic dimensions which can indicate a violation of equality rights.

Therefore, for Sheppard, "the harms of discrimination include the actual economic, psychological, physical, social, and political conditions of disadvantage and exclusion."[230] She concludes that this reframing of the contextual factors "would reinforce and promote an inclusive conception of equality."[231] It seems that all the contextual factors Sheppard has identified can be a part of the legal analysis for identifying a secure belonging in a democratic society.

Another Canadian scholar seems to refer to all the disadvantages which violate a secure belonging in a democratic society. Moreau talks about all those disadvantages which involve, "oppression or unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society."

227 *Id.* at 63.
228 *Id.*
229 *Id.*
230 *Id.*
231 *Id.* at 63–64.

As Moreau states, this would include cases, for instance, that do not involve either overt prejudice or false stereotyping.[232] Abella J., who saw, along with the majority of the Court in *Quebec*, that the perpetuation of a historical disadvantage was the relevant contextual factor, agrees with Professor Sophia Moreau.[233] She agrees that prejudice and stereotyping are two of the indicia that may help answer that question. They are not discrete elements of the test which the claimant is obliged to demonstrate.[234] She also quotes approving Moreau's concerns for not having such a narrow interpretation. Moreau's concern is about not leaving out of the scope of protection of s. 15(1) "other ways in which individuals and groups, that have suffered serious and long-standing disadvantage, can be discriminated against." Therefore, Abella J., and Moreau see that stereotype and prejudice are just some factors which indicate discrimination, but they are not the only ones. They therefore understand prejudice and stereotype as specific forms of the relevant general disadvantageous conduct of discrimination. However, this conduct may get other specific forms as well. In their understanding, what discrimination includes is oppression and dominance.

Sheppard, Moreau and Abella J.'s insights contribute to the judicial task to identify in each context the relevant contextual factors which indicate violation of the *right to secure belonging in a community of equals*. I have suggested at least three of them: prejudice, stereotype and perpetuation and/or worsening of a disadvantage and an emphasis on the systemic political disadvantage. I have made clear that this is not an exhaustive list of contextual relevant factors. Other ways of oppression and dominance which demean the secure belonging in a community of equals in the certain case should be considered as contextual factors. Sheppard, Moreau and Abella J.'s insights seem to appeal to the same guiding principle as my suggestion. The principle is an inclusive democratic society. But, to achieve inclusive democracy, one needs a secure membership/belonging in a democratic society.

Concluding Comment

The first concluding comment of this chapter is the argument that *the right to secure belonging* is inherent in and a first criterion of *the right to equal belonging* in a society. The second concluding comment is about the suggested constituent elements of *the right to secure belonging in a community of equals*. These elements are the following: (i) absence of a systemic political disadvantage; (ii) absence of prejudice; (iii) absence of stereotype; (iv) absence of perpetuation and/or worsening of a pre-existing (socioeconomic, historical,

232 Quebec (Att'y Gen.) v. A, 2013 SCC 5, para 325, [2013] 1 S.C.R. 61 (Can.) (Per Abella J., majority on section 15(1)), quoting Sophia Moreau, above n. 180, at 292.

233 *Quebec (Att'y Gen.) v. A*, 2013 SCC 5, at para 325.

234 *Id.*

systemic political) disadvantage, and (v) absence of any other disadvantages which demean secure belonging in a community of equals. The third conclusion is that all the above suggested contextual factors should be assessed within a contextual and effects based analysis, in order to provide for a substantive *right to secure belonging*. The fourth concluding comment is that social scientists may be the experts in the field of prejudice and stereotype and that they themselves find that future research is still necessary. Fifth, the Canadian test of the analysis of the section 15 has been very influential on the proposal of *the right to secure[/safe] belonging in a community of equals*. The contextual factors the Court uses, (prejudice, stereotype, perpetuation of a pre-existing disadvantage) have been the model which the suggested contextual factors of *the right to secure belonging* have been built upon. Three out of the five suggested contextual factors are professed by the Court as parts of the Canadian test under the analysis of section 15. I however distinguish the Court's profession of these factors and the question of whether these factors are always applied in a substantive and purposive way by the Supreme Court of Canada. The fact is that in Canadian jurisprudence prejudice, stereotype and perpetuation of a disadvantage are named in the Canadian test with the explicit goal to protect substantive equality rights. My approach is also a call for the Canadian Court to continue and enhance the effort of applying a substantive and purposive approach of the equality rights. All the suggested contextual factors are here understood to establish violation of *the right to a secure belonging in a community of equals*. The above concluding remarks can be summarized as follows:

(A) Secure Belonging = Absence of systemic political disadvantage + Absence of prejudice* + Absence of stereotype* + Absence of perpetuation* and/or worsening of pre-existing disadvantage (socioeconomic, historical, systemic political)* + Absence of any other disadvantage which demeans secure belonging in a community of equals (any other ways of oppression/dominance, which affect equal membership)

(B) *drawn upon the test of the Supreme Court of Canada applies under section 15.

(C) Contextual and effects based analysis of the contextual factors of the *right to secure belonging* = right to substantive secure belonging

(D) Social scientists may be the experts in the field of identifying and understanding the harms of prejudice and stereotype.

(E) An establishment of any of the contextual factors of an unsafe/insecure belonging, it is an establishment of *a violation of the right to secure belonging in a community of equals*, and *a prima facie violation of the right to Equal Belonging in a Democratic Society/Democratic Belonging*.

However, a secure belonging alone can not provide equal belonging in a democratic society. The *right to* "free-identity" belonging is also needed to

enjoy *the right to equal belonging*. I turn now to this second criterion and inherent right in *the right to equal belonging*: the *right to a* "free-identity" belonging *in a community of equals*. The violation of this second inherent right, like *the right to secure belonging*, establishes *a prima facie violation of the Right to Equal Belonging in a Democratic Society*.

4 The Right to "Free-Identity" Belonging in a Community of Equals

Introduction

Belonging in a community of equals goes with equal freedom to choose the way to belong. You feel of equal worth, when you are free to choose the nature of your belonging in a certain relationship. You can feel secure and free in identity when you are equally free to belong in the way you wish to belong. In other words, to have an equal belonging presupposes the equal freedom to define your relationships within a group. It is an individual right, but memberships matter. This is what I call *the right to* "free-identity" belonging. This is an inherent right in the more general *right to equal belonging* or *the right to belong to a community of equals.*

This chapter is divided in three sections. In the first section, I will explain the theoretical foundations of the right to "free-identity" belonging, showing why the right is a part of the right to belong to a community of equals. I identify two main theoretical premises: (i) the general acceptance that every person is unique, autonomous and of equal worth, and (ii) the relational feature of the human life.[1]

In the second section, I discuss the forms of this right. As a result, and because of the above two theoretical premises, the "free-identity" belonging can be composed of different "identity group differentiated rights or claims," meaning the group has differentiated claims or rights which involve identity issues. Here, I discuss four types of "identity group differentiated claims or rights" which are kinds of identity equality claims. I talk about the "identity group differentiated rights or claims," which are based primarily on race and/or ethnic origin and the related grounds of language. Even if religion can also be implied, I don't primarily discuss it or gender or other grounds for distinction. I will discuss *the grounds of unequal belonging* in Chapter 6. The five types of "identity group differentiated claims or rights" are: (i) promoting immersion and integration; (ii) amelioration of a disadvantage rooted in history and promoting integration, peace and reconciliation; (iii) preventing assimilation,

1 This is a paraphrase of the words used by Charles Taylor: "dialogical feature of human life." As the reader will see throughout the chapter, Taylor's work has been very influential for this chapter.

while promoting integration; (iv) claims or rights of exclusion of laws and regulations, but not in the form of self-government rights, and (v) self-government rights.

In the third section, I will suggest some criteria for the legal assessment of the identity group differentiated claims or rights. I identify four general criteria which can be described in the form of four questions:(i) [how much] does the identity group differentiated claim or right express the personal uniqueness and autonomy of the beneficiaries? (ii) [how much] does the identity group differentiated claim or right represent the real interests of the beneficiaries? (iii) [how much] is the identity group differentiated claim or right remedial? (iv) [how much] does the identity group differentiated claim or right respect the *minimum internal liberalism*? It is a different question as to whether and how this "free-identity" belonging can be reasonably limited in a democratic society. This will be the subject of a second pillar of the analysis over whether the limits of the right are reasonable in a democratic society. I don't develop this analytical pillar in my book. This is a second analytical pillar common for the analysis of the restrictions of all rights and not only the *Right to Equal Belonging in a Democratic Society*. The purpose of my book is to define the scope of the *Right to Equal Belonging in a Democratic Society*. However, the theoretical premise of what constitutes a democratic society in which the scope of the right is defined and the rights can be reasonably restricted is described in Chapter 2. This theoretical background is necessary for both analytical pillars. Again, the main purpose of my book is to define the broad scope of the ultimate right of the *Right to Equal Belonging in a Democratic Society* or in other words, the *Right to Democratic Belonging*.

I. The Right to "Free-Identity" Belonging: Theoretical Foundation

i. Every Person is Unique, Autonomous and of Equal Worth

Freedom to be true to yourself presupposes equality to define your relationships. Equality is thus intertwined with freedom to be unique and original. In the inverse, inequality is thus a disadvantage of freedom to define your belonging to your relationships. Defining your belonging to these relationships, you define your self. "Free-identity" belonging in a society/a relationship/group of equals means equally "free-identity" belonging in this relationship, because people are unique, equally free and members of equal worth. Their needs, wishes, resources, moral perceptions and life plans are different. And that's all right and beautiful! The *right to* "free-identity" belonging enables self identification. In particular, it should enable each person to define his/her relationships within the society, so as to prevent or remedy oppression, in the form of restricted opportunities and hetero-definition, because of identity. "Free-identity" belonging is therefore intertwined with personal autonomy. As the word autonomy connotes, the law of yourself comes from within yourself.

The above ideas of personal uniqueness, autonomy and equal worth can be seen in our times as generally accepted. They have been very nicely expressed among other contemporary philosophers by Taylor and Kymlicka. It is to their insights I now turn.

Charles Taylor, advocating for the politics of recognition,[2] uses the idea of authenticity.[3] Using this idea, he explains the need to be original and pursue a life which is distinct and unique, without imitating others' models.[4] He then talks about the idea that "the source is within"[5] and the importance of "the inner voice" as concepts of authenticity.[6] He goes on to talk about "being in touch with our feelings"[7] in order to "be true and full human beings."[8] He emphasizes:

> [t]his is the powerful moral ideal that has come down to us. It accords moral importance to a kind of contact with myself, with my own inner nature, which it sees as in danger of being lost, partly through the pressures toward outward conformity, but also because in taking an instrumental stance toward myself, I may have lost the capacity to listen to this inner voice. It greatly increases the importance of this self-contact by introducing the principle of originality: each of our voices has something unique to say. Not only should I not mold my life to the demands of external conformity; I can't even find the model by which to live outside myself. I can only find it within.[9]

Kymlicka explains the intertwined nature of self definition, personal autonomy and good life. He finds that there are two conditions for leading a good life. The first is to lead your life from the inside. People then need to have access to resources to enjoy this freedom.[10] The second condition is to have the freedom to change your mind. Education, freedom of expression, and freedom of

2 Charles Taylor, "The Politcs of Recognition" *in Multiculturalism and "the Politics of Recognition" An Essay by Charles Taylor* (Amy Gutman ed. 1992).
3 *Id*. at 28–30.
4 *Id*. at 30 (stating that "[t]here is a certain way of being human that is my way. I am called to live my life in this way, and not in imitation of anyone else's life. But this notion gives a new importance to be true to myself. If I am not, I miss the point of my life; I miss what being human is for me.").
5 *Id*. at 29 (following the usage of the idea by Lionel Trilling, *Sincerity and* Authenticity (1969).)
6 *Id*. at 28.
7 *Id*.
8 *Id*. at 28. *See also* at 29 (discussing Rousseau's "le sentiment de l'existence" which is how Rousseau names the "authentic moral contact with ourselves").
9 *Id*. at 30.
10 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 81 (1995) (stating that "[s]o we have two preconditions for leading a good life. The first is that we lead our life from the inside, in accordance with our beliefs about what gives value to life. Individuals must therefore have the resources and liberties needed to lead their lives in accordance with their beliefs about value, without fear

association are considered sources of new information that may lead people to revise their current beliefs and values.[11] As Kymlicka says, the above concerns fall within "the traditional liberal concern with individual privacy, and opposition to "the enforcement of morals."[12]

While a myriad of other scholars discuss personal uniqueness, personal autonomy and equal worth, it is not necessary for the scope of this book to present it all. The general acceptance of the ideas of personal uniqueness, autonomy and equal worth does not need much theoretical defense here. Instead, I suggest the best application within the *theory of the right to democratic belonging*. Within this chapter, I emphasize that personal uniqueness, autonomy and equal worth are one of the main theoretical premises of the *right to* "free-identity" belonging *in a community of equals*.

ii. Relational Feature of Human Life

The second main theoretical premise of the "free-identity" belonging is the fact that human life is inherently relational. When accommodation of the personal difference/needs exists in relation to some other people who share the same needs and wishes, the accommodation of personal difference is at the same time an accommodation of a group difference. It exists, however, to serve the individual members of the group. The "free-identity" belonging is an individual right, but membership is also a necessity. Therefore, it is suggested that identity free belonging may presuppose an equal freedom to have a unique or differentiated group belonging in the larger society. This is why I contemplate differentiated rights as *group* differentiated ones. Thus, people are provided a unique and differentiated way to achieve equal belonging in the society. Their membership matters because it matters for them. This society may be the larger domestic or international society. It may be also a more specific group: an identity or a social group. Oppression can exist within the same community. The issue of protection of the oppression of the individual within a specific group is related to the notion of *minimum internal liberalism* I will introduce in the third section of this chapter. Internal or external oppression can not fall within the scope of the right. This does not mean however that we can not accept reasonable limits of this right in a democratic society.

of discrimination or punishment. Hence the traditional liberal concern with individual privacy, and opposition to "the enforcement of morals".").

11 *Id.* (stating that "[t]he second precondition is that we be free to question those beliefs, to examine them in light of whatever information, examples, and arguments our culture can provide. Individuals must therefore have the conditions necessary to acquire an awareness of different views about the good life, and an ability to examine these views intelligently. Hence the equally traditional liberal concern for education, and freedom of expression and association. These liberties enable us to judge what is valuable, and to learn about other ways of life.").

12 *Id.*

Many scholars have seen the value of the community to the personal well-being. Taylor deliberated on the dialogical feature of human life,[13] providing his thesis:

> [O]ur identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Non recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.[14]

He explains that the freedom "to be true to myself" and "discover myself"[15] is related to a recognition by the others. Taylor sees that the genesis of the identity "can not be socially derived, but must be inwardly generated."[16] He then explains that "the crucial feature of human life is its fundamentally dialogical character."[17] Explaining the significance of language in generally understanding ourselves and defining our identity, Taylor says that "we learn these modes of expression through exchange with others."[18] However, he emphasizes that "we should strive to define ourselves on our own to the fullest extent possible."[19] Taylor calls to "get some control over the influence" of the others and "avoiding falling into … dependent relationships."[20]Explaining how the monological ideal underestimates the place of the dialogical one in human life, he says that, "[i]f some things I value most are more accessible to me only in relation to the person I love, then she becomes part of my identity."[21]

13 Taylor, *above* note 2, at 32.

14 *Id*. at 25.

15 *Id*. at 28, 31. As he says,"[w]e might speak of an individualized identity, one that is particular to me, and that I discover in myself. This notion arises along with an ideal, that of being true to myself and my own particular way of being." *Id*. at 28. He goes on to explain, "[b]eing true to myself means being true to my own originality, which is something only I can articulate and discover. In articulating it, I am also defining myself. I am realizing a potentiality that is properly my own. This is the background understanding to the modern ideal of authenticity, and to the goals of self-fulfillment and self-realization in which the ideal is usually couched." *Id*. at 31.

16 *Id*. at 32.

17 *Id*.

18 *Id*. As he goes on to explain,"[t]he genesis of the human mind is in this sense not monological, not something each person accomplishes on his or her own, but dialogical." *Id*.

He also says,"[w]e define our identity always in dialogue with, sometimes struggle against, the things our significant other want to see in us." *Id*. at 33.

19 *Id*. at 33.

20 *Id*. As he goes on to say, "[w]e need relationships to fulfill, but not to define, ourselves." *Id*.

21 *Id*. at 33–34. He goes on to say, "[t]hus my discovering my own identity doesn't mean that I work it our in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others. That is why the development of an ideal

Taylor emphasizes that the recognition of our distinct identity is important for the freedom to develop our identity. Therefore, the difference-blind society is for Taylor, inhumane and discriminatory.[22] He finds that a difference-blind society can make some people "suffer the pain of low self-esteem."[23] As he says, "[t]he struggle for recognition can find only one satisfactory solution, and that is a regime of reciprocal recognition among equals."[24] For Taylor, "[t]here must be something midway between the inauthentic and homogenizing demand for recognition of equal worth, on the one hand, and the self-immurement within ethnocentric standards, on the other."[25] This provides a presumption of equal worth.[26]

Kymlicka also emphasizes the significance of the societal cultures to people's freedom and well-being.[27] He finds that societal cultures are a context of choice.[28] As he says, "[c]ultural membership provides us with an intelligible context of choice, and a secure sense of identity and belonging, that we call upon in confronting questions about personal values and projects."[29] Kymlicka summarizes his argument as follows:

> [f]reedom of choice is dependent on social practices, cultural meanings, and a shared language. Our capacity to form and revise a conception of the good is intimately tied to our membership in a societal culture, since the context of individual choice is the range of options passed down to use by

of inwardly generated identity gives a new importance to recognition. My own identity crucially depends on my dialogical relations with others." *Id.* at 34.

22 *Id.* at 43 (stating that, "[c]onsequently, the supposedly fair and difference- blind society is not only inhuman (because suppressing identities) but also, in a subtle and unconscious way, itself highly discriminatory.") *Id.*

23 *Id.* at 26. He goes on to say, "[t]heir own self-depreciation, on this view, becomes one of the most potent instruments of their own oppression." *Id.*

24 *Id.* at 50.

25 *Id.* at 72.

26 *Id.* at 73. For the ground of this presumption, Taylor states that he cannot rule out that this may be a religious one. As he says, "[p]erhaps one could put it another way: it would take a supreme arrogance to discount this possibility a priori."

27 Kymlicka, *above* note 10, at 80 (discussing Liberalism and Individual Freedom). As he explains, "[t]he defining feature of liberalism is it that ascribes certain fundamental freedoms to each individual. In particular, it grants people a very wide freedom of choice in terms of how they lead their lives. It allows people to choose a conception of the good life, and then allows them to reconsider that decision, and adopt a new and hopefully better plan of life." *Id.*

28 *Id.* at 82.

29 *Id.* at 105. He goes on to explain, "[a]nd the fact that national identity does not require shared values also explains why nations are appropriate units for liberal theory-national groupings provide a domain of freedom and equality, and a source of mutual recognition and trust, which can accommodate the inevitable disagreement and dissent about conceptions of the good in modern society." *Id.* at 105–106.

> our culture. Deciding how to lead our lives is, in the first instance, a matter of exploring the possibilities made available by our culture.[30]

I share the view that cultural security is necessary for many people as a context of meaningful choice, even in the age of cosmopolitanism. Cosmopolitanism has indeed offered to people even more multiple and complex identities. However, unique personal cultures, experiences and perceptions, and cultural membership in the age of cosmopolitanism still matter for many people. The dangers of communitarianism can be avoided through a liberal theory of minority rights.

Offering a contrary point of view in 1989, Waldron advocated for cosmopolitanism, while cautious to recognize cultural membership. He does recognize a "communal reality" of the individual lives even in the age of cosmopolitanism. However, Waldron does not accept that, in this age, the attachment to one particular community which is homogeneous can be crucial in the individual freedom of some people.[31]

In particular, Waldron challenges two assumptions in Kymlicka's earlier work. First, he discusses an "assumption that the social world divides up neatly into particular distinct cultures, one to every community."[32] For Waldron, "we need culture, but we do not need cultural integrity."[33] He finds that in the age of cosmpolitanism, personal identities are very complex and composed of a myriad of different pieces of cultures, which cannot be found in a certain cultural homogeneous community. He finds that recognition of cultural communities can be arbitrary as this recognition does not demonstrate the uniqueness of a cosmopolitan self. He recognizes the relational way of living of the human being[34] and the value of communities the human beings belong to,[35] rejecting the atomistic vision of human beings. What he does not recognize is the idea of belonging to a homogeneous cultural group.[36] For Waldron, "[w]e need to understand our choices in the contexts in which they make sense, but we do

30 *Id.* at 126.

31 *See generally* Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative" 25 U. Mich. J.L. Reform 751 (1991–1992). *See also* for a similar description of Waldron's argument Kymlicka, *above* note 10, at 102 (stating that "Waldron accepts that the meaningfulness of options depends on the fact that they have cultural meanings. But he rejects the assumption that the options available to a particular individual must come from a particular culture.")

32 Waldron, *above note* 31, at 781–782.

33 *Id.* at 786.

34 *See generally, id.* at 769–777 (explaining the interdependency of the people (economic,moral and political) and embracing the Aristotelian view that the human being is a social/political being (zoon politicon)).

35 *e.g., id.* at 779 (stating that, "[w]e may pretend to be self-sufficient atoms, and behave as we are supposed to behave in the fantasies of individualist economics; but the pretense easily is exposed by the reality of our communal life.").

36 *Id.* at 778 (stating that "the simple Herderian picture of the constitution of an individual through his belonging to a homogeneous group begins to fall apart.").

not need any single context to structure all our choices."[37] Therefore, he challenges, at this point, Kymlicka's understanding of, as Waldron describes, "the purity of a particular cultural heritage."[38]

Waldron discusses a second assumption he reads in Kymlicka's earlier work: "what everyone needs is just *one* of these entities – a single, coherent culture – to give shape and meaning to his life."[39] In particular, he criticizes Kymlicka's argument that "each person needs some assurance of the *security* of the cultural framework or frame-works from which she makes her choices."[40] Waldron finds that "[i]n general, there is something artificial about a commitment to *preserve* minority cultures"[41] He bases his argument on the ground that "cultures live and grow, change."[42] As he explains:

> [t]o *preserve* a culture is often to take a favored "snapshot" version of it, and insist that this version must persist at all costs, in its defined purity, irrespective of the surrounding social, economic, and political circumstances.[43]

He finds that this "stasis envisaged from such preservation"[44] "cripple[s] the mechanisms of adaptation and compromise (from warfare to commerce to amalgamation) with which all societies confront the outside world."[45]

Waldron's concerns are valid to the greater extent. Indeed, to define what is culture is a complex issue with dangers of restricting development and individual freedom. Indeed, communitarianism can be abused to oppress individual freedom and self-development.[46] Cultures grow and change. Indeed, we can learn from each other and change. However, all his justified and useful concerns do not mean that Waldron's conclusion is correct.

At least in his later work, Kymlicka seems to respond to all Waldron's concerns. In particular, Kymlicka agrees with Waldron that "[o]n any liberal view, it is a good thing that cultures learn from each other."[47] But he straightforwardly believes Waldron's conclusion is mistaken and distinguishes between the existence of a culture and its modernization.[48] The latter is a change of the character of

37 *Id.* at 776.
38 *Id.* at 786.
39 *Id.* at 783.
40 *Id.* at 786.
41 *Id.* at 787.
42 *Id.*
43 *Id.* at 788.
44 *Id.* at 788.
45 *Id.*
46 I will discuss this issue in the third section under the heading "minimum internal liberalism."
47 Kymlicka, *above* note 10, at 102.
48 *Id.* at 103–104 (stating that "[t]hat we learn in this way from other cultures, or that we borrow words from other languages, does not mean that we do not still belong to separate societal cultures, or speak different languages."). He goes on to

the culture. Moreover, Kymlicka's argument for cultural security, in the sense of external protections is based on the need for a security that a member of a cultural community will not be oppressed by the decisions of the larger society.[49] An understanding of Kymlicka's advocacy for cultural security is complete only with the additional understanding of his accompanied skepticism over "internal restrictions." These are restrictions which groups may impose on their members.[50] His skepticism answers Waldron's concern about the protection of the individual freedom within a group, while it confirms that the groups are not homogeneous.[51] Therefore, any debate between Kymlicka's earlier work and Waldron is likely resolved through Kymlicka's responses and clarifications.

Therefore, if one values her/his relationship with some other people, the protection of this relationship is itself an individual good. If one values the legitimate freedom to be members of a certain group of people, this freedom becomes an individual right where memberships necessarily matter. Even an isolated caveman may value his relationship with nature or superior powers. Human life is inherently relational. The individual rights relate to the individuals. But, individuals come with and cannot be separated from their relationships. They are members of their relationships. These relationships may have one or many members.

II. Forms of the Right: Identity Group-Differentiated Claims and Rights

Personal uniqueness and autonomy, "dialogical feature of human life" and equal worth for all result in identity group differentiated claims or rights. These are claims or rights which involve issues of identity. They express a differentiated belonging for equally unique, autonomous persons, or, in other words, for equally free in their identity people in a certain society. These claims are necessarily *group*-differentiated claims as identity issues relate to and are shared with the members of certain groups.

Taylor has argued for "deep diversity, where a plurality of ways of belonging would also be acknowledged and accepted."[52] Discussing the questions of "unity" and "distinctiveness," and equality,[53] he closes his suggestion on

say, that "[w]e must, therefore, distinguish the existence of a culture from its 'character' and any given moment". *Id.*

49 *Id.* at 36.

50 *Id. See also* Will Kymlicka, 'Ethnocultural Diversity in a Liberal State: Making Sense of the Canadian Model(s)' 61 (2007) (explaining again the distinction between "external protections" and "internal restrictions").

51 I will come back to this issue in the discussion of the "internal minimum liberalism."

52 Charles Taylor, "Shared and Divergent Values", *in Options for a New Canada* 75–76 (Douglas M. Brown and Ronald L. Watts eds., 1991) (arguing for "levels of diversity.")

53 *See generally,id.*

shared and divergent values, discussing "the levels of diversity."[54] In "first-level diversity," the "patriotism or manner of belonging" of the people is "uniform, whatever their other differences, and this is felt to be necessity if the country is to hold together."[55] For Taylor, "[t]his is far from accommodating all Canadians."[56] Instead, "second-level diversity or 'deep' diversity" allows for "a plurality of ways of belonging."[57] In "deep" diversity, people "might belong in a very different way"[58] and be Canadians "through being members of their national communities."[59] Taylor calls for accepting "the perfect legitimacy of the 'mosaic' identity.[60] He finds that "[t]o those who believe in according people the freedom to be themselves, this would be counted a gain in civilization."[61] Moreover, deep diversity is the way "[t]o build a country for everyone[.]"

Kymlicka appeals to Charles Taylor's theory of "deep" diversity.[62] He explains different models of belonging for different groups within different countries.[63] He emphasizes the different ways of belonging to different groups and he calls for "respect[ing] a diversity of approaches to diversity."[64] It seems that he discusses the different types of group differentiated rights as "different models of belonging."[65] He insists on that same philosophy in the book *Belonging? Diversity, Recognition and Shared Citizenship in Canada*.[66] In his contribution, Kymlicka reviews Canada's three sets of diversity policies. He

54 *Id*. at 74–76.
55 *Id*. at 75.
56 *Id*.
57 *Id*.
58 *Id*. at 76.
59 *Id.at* 76.
60 *Id*.
61 *Id*.
62 Kymlicka, *above* note 10, at 189 (stating that, "Taylor calls for accommodating not only a diversity of cultural groups, but also a diversity of ways in which the members of these groups belong to the larger polity.").
63 *Id*. at 190 (discussing the model of belonging of immigrants in the United States, the appropriate model of belonging for the Puerto Ricans or Navaho, francophones and indigenous peoples in Canada and cultural groups in polyethnic and multinational countries).
64 *Id*.(stating that "[p]eople not only belong to separate political communities, but also respect a diversity of approaches to diversity."). *See also* for a related idea Nikos Alivizatos, "Does Multiculturalism Need a New Theory of Human Rights?" [Χρειάζεται η πολυπολιτισμικότητα μια νέα θεωρία ανθρωπίνων δικαιωμάτων? Chreazetai e polypolitismikotita mia nea theoria anthropinon dikaiomaton?] 28 Human Rights [Δικαιώματα του Ανθρώπου, DIKAIOMATA TOU ANTHROPOU] 1210 (2005) (Greece) (quoting Francis Delpérée, "Nouveaux aspects de la citoyenneté", *in Essays in Honour of Georgios Kasimatis* 371 (Berliner Wissenschafts et al. eds., 2004) Francis Delpérée, discussing the transformation of citizenship, has suggested a "citoyenneté unique").
65 Kymlicka, *above* note 10, at 190 (discussing models of belonging for different groups).
66 Kymlicka, *above* note 50, at 39.

emphasizes that "it is misleading to talk of 'the Canadian model of diversity'."[67] Instead, Kymlicka recognizes a "tripartite structure"[68] and "three silos, with their own separate histories, discourses, legal frameworks and governance structures."[69] His "three forms of diverse citizenship in Canada"[70] include one of immigrant/ethnic groups,[71] a second for aboriginal peoples,[72] and a third for Francophones/Quebecois.[73] While Kymlicka sees that all these groups "need counter majoritarian protection," he stresses that there are different forms of this protection.[74] These are "anti-discrimination and undifferentiated citizenship, but also various group-specific accommodations."[75]

Kymlicka has long ago distinguished three types of group differentiated rights:[76] (1) self-government rights, (2) polyethnic rights, and (3) special representation rights.[77] While he sees that the first type of rights may sometimes pose dangers for social unity,[78] the second type of rights are claims for inclusion.[79] Both the first two rights are permanent, as they aim to maintain a kind of autonomy that society does not aim to eliminate. The third type of rights can be permanent or temporary, depending on their context-specific rationale. If they are a corollary to self-government rights or aim to preserve a culture, they will be permanent.[80] They will be temporary, if they are ways to ameliorate a disadvantage and protect from discrimination and oppression we try to eliminate. In the later case, the representation rights are legitimate only in so far the need for the special rights exists and "they are most plausibly seen as a temporary measure[.]"[81] Kymlicka sees all the above three types of group differentiated rights as examples and not as the only possible forms of such rights.[82]

67 *Id.* at 41.
68 *Id.*
69 *Id. See also* Keith Banting, Thomas J. Courchene and F. Leslie Seidle, "Introduction" *in* Volume III *Belonging? Diversity, Recognition and Shared Citizenship* 18 (Keith Banting, Thomas J. Courchene and F. Leslie Seidle) (2007) (describing the contributions in the book related to Canadian approaches to recognizing and accommodating diversity, they conclude that, "[t]here is no single, neatly integrated diversity model in Canada. There is variation across the three dimensions of diversity.").
See also Keith Banting et al. *above*, at 2–3 (explaining that contributors in this book "explore diversity and belonging in the contemporary era.").
70 Kymlicka, *above* note 50, at 43.
71 *Id.* at 43–46.
72 *Id.* at 46–48.
73 *Id.* at 49–52.
74 *Id.* at 58.
75 *Id.*
76 Kymlicka, *above* note 10, at 27.
77 *Id.*
78 *Id.* at 181–186 (explaining self-government and separatism).
79 *Id.* at 176–181 (explaining polyethnicity and inclusion).
80 *Id.* at 32–33.
81 *Id.* at 32 (calling these measures a kind of "political affirmative action.").
82 *Id* at 27 (stating that "[t]here are at least three forms of group-specific rights[.]").

Joseph Eliot Magnet has similarly distinguished three types of equality claims: (a) non-discrimination, (b) adaptive, and (c) maintenance claims.[83] With respect to the non-discrimination claims, Magnet finds that "the reason why laws that discriminate on the basis of immutable characteristics are equality violations is that they insult human dignity."[84] Both Magnet and the Supreme Court of Canada in *Law*, talk about full participation in the Canadian society under the heading of "human dignity."[85] These claims seem to fall more in *the right to secure belonging*, as it has been defined in the previous chapter. As far as the adaptive claims are concerned, he explains that the groups of people who may advance these claims are persons who "want to participate fully in Canadian society."[86] However, these people "want assistance in learning Canadian languages, culture and norms."[87] Magnet sees that these are claims based on the principle of multiculturalism which promote integration in the Canadian mainstream.[88] Maintenance claims are different, as they "are advanced by subnational groups which want to maintain intact, indefinitely into the future, the distinguishing features of identity that bind them together as a distinct society."[89] For Magnet, "the celebration of difference" contributes to the development of "a sense of belonging in the society of which he or she is a part."[90] Distinguishing these types of equality claims, Magnet recognizes different means of achieving equal belonging, while recognizing difference and the plurality of ways to belong in a pluralist Canada.

Influenced by the above insights, I identify five types of identity group differentiated rights and/or claims.

83 Joseph Eliot Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* 227 (2004); Joseph Eliot Magnet, "Multiculturalism and Collective Rights" 27 *S. C.L.R.* (2D) 431, 440 (2005). Joseph Eliot Magnet and Mark C. Power, "Institutional Reform: Maintenance Claims and Equality for Canada's Official-Language Minorities" 39 *S.C.L.R* (2D) 388 (2008).

84 Magnet (2005) *above*, at 225 (citing Law v. Canada, at para.53).

85 *Id.* Magnet (2004) wrote his book after Law v. Canada (Min. of Emp't. & Immigration), [1999] 1 S.C.R. 497 (Can) and before R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483 (Can.) where the Court rearticulated the test avoiding focus on human dignity as a legal tool. As he says, "[n]on discrimination claims are advanced by equality seekers who want to participate fully in Canadian society. They claim the right to dismantle barriers that inhibit their participation in Canadian life, particularly barriers created by the state on the grounds of some immutable personal characteristic."

86 *Id.* at 225 (stating that adaptive claims are advanced by persons who want to participate fully in Canadian society but who lack fluency in Canadian languages or who are unfamiliar with how things work in Canada).

87 *Id.* at 226.

88 *Id.* at 227.

89 *Id.*

90 Magnet (2005), *above* note 83, at 431, 433–434.

i. Promoting Immersion and Integration

The first type of the suggested *identity group differentiated rights and/or claims* is the claims or rights for measures which promote immersion and integration. Positive measures, which aim to assist people to learn the culture, system, and working languages in the larger society, contribute to the process of their immersion and integration. Such measures can contribute to the immersion and integration of non-native speakers of the official languages of certain country. In the longer term, these measures can improve their competitiveness for admission to institutions of higher education, employment, political life and public offices.[91]

Such measures may fall within the one category of equality claims that Magnet identifies, namely "adaptive" rights. He is talking about people who "want assistance in learning the Canadian languages, culture and norms."[92] These are measures which facilitate immigrants to find their way into full participation in the society by "acquir[ing] familiarity with Canada's languages, society, economy and way of life."[93] Magnet reports that "[c]onsiderable multiculturalism programming is inspired by the vision that pride in their heritage will assist immigrant communities to be, and to feel truly equal to others in Canadian life."[94] As he emphasizes, the purpose of the adaptive programs is to facilitate integration,[95] while "[t]he focus is [still] on pride in difference.[96]

Therefore, members of some identity groups may need more courage and effort to gain the necessary tools for full participation in the larger social and economic structure. They lack knowledge of the official languages and the social and economic structures in a certain society. Positive measures that

91 For instance, ESOL classes (English as a second language) in the United States or Canada or other multicultural English speaking countries are very common. Another example is the funding for Greek language classes for Muslim Greek students and their mothers at the Centers of Educational Support of the Program for the Education for the Muslim children (KESPEM) in Greece. Muslim children in Greece usually don't have Greek as their first language. However, the largest part of the funding for these programs in Greece comes mainly from European Union funded programs, rather than from the Greek government.

92 Magnet (2004), *above* note 83, at 226.

93 *Id.*

94 *Id.* at 226–227.

95 *Id.* at 227(stating that, "adaptive programming assumes that persons from diverse cultural backgrounds will integrate into mainstream institutions and acquire one of the two official languages. The purpose of multiculturalism programming is to facilitate the integration process by making Canadian institutions more responsive to the specific needs and challenges people of diverse cultures face in coming into the Canadian mainstream, and also to facilitate the integration process.").

96 *Id.* at 226. *See also* Martha Minow, "After *Brown*: What Would Martin Luther King Say?" 12 Lewis & Clark L. Rev. 1 599, 604–605 (2008) (concerning people who don't speak English at home). As she says, "[d]iversity should enlarge the integration ideal to be fully inclusive and could embed racial mixing in the attitude of appreciation for different backgrounds and perspectives." *Id.* at 604.

respond to this disadvantage fall within the ameliorative measures aiming at their immersion and integration.

ii. Ameliorating a Disadvantage Rooted in History and Promoting Integration

The second type of the suggested "identity group differentiated rights and/or claims" is the claims or rights for measures ameliorating a disadvantage rooted in history and promoting integration. The affirmative action admissions programs at institutions of higher education (*e.g.*, affirmative programs for African Americans in the institutions of higher education in the United States) can be understood as examples of measures within this category.

These measures are related to a kind of claim discussed in the previous chapter. In particular, it is related to the perpetuation and/or worsening of a disadvantage rooted in history. I have suggested that this is a contextual factor which proves a form of injustice which violates the *right to secure belonging*. The discussion there about the nature of the disadvantage rooted in history is applicable here as well. The specific point I make in this subsection is that the claim for amelioration of such disadvantage falls also within the scope of protection by the *right to* "free-identity" belonging. The historical wrong usually is a wrong related to the identity of the people, causing a damage related to that same identity. It is not a mere disadvantage of social or economic nature. The scar is deeper because the wrong is directly related to identity, the very nature of the self.

iii. Preventing Assimilation and Promoting Integration

Different groups may advance claims to both preserve their identity distinctiveness, as well as to be integrated in the larger society. These claims to preserve their culture include claims concerning choices, well-being and freedom within their distinctive cultural context. At the same time, these claimants seek promotion of their integration in the larger society. For example, the different groups may seek public funding for identity-related activities. These claims may include research, "ethnic associations, magazines, and festivals, funding for ethnic studies and ethnic associations, the provision of immigrant language education in schools."[97] In this frame of claims, people seek to be full members of a single larger community, while preserving their distinct membership in some smaller identity communities. They believe that membership in the

97 Kymlicka, *above* note 10, at 31 (providing examples of polyethnic rights). Similarly, funding for organizing a Native American Pow Wow, for research in the culture of Natives or for classes on issues of Native culture, identity, history, rights and legal regime in aboriginal reservations can also fall within the right to equally "free-identity" belonging in the society and college.

minority-identity community does not prevent their full membership in the larger community.

These claims or rights that aim at preventing assimilation while promoting integration fall within Kymlicka's "polyethnic" rights. "Polyethnic rights are intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society."[98] This very broad category also includes claims of preventing assimilation and promoting integration. As examples, Kymlicka discusses antiracism policies, claims for public funding of cultural practices, and demands for exemptions from laws and regulations. However, with respect to antiracism policies, Kymlicka notes that these "do not really qualify as group differentiated citizenship rights."[99] He instead correctly notes that "these policies are primarily directed at ensuring the effective exercise of the common rights of citizenship."[100]Kymlicka's antiracism policies fall either in the polyethnic rights, the claims for promoting immersion and integration, and/or ameliorating a disadvantage rooted in history and promoting integration. He views that "these polyethnic rights are not seen as temporary, because the cultural difference they protect are not something we seek to eliminate."[101]

Claims for exceptions from laws and regulations may fall also within this category depending on the extent and the nature of the exception that people may seek. However, it is better that the judge and the policymaker analyze these claims separately because some distinct issues arise.

iv. Claims or Rights for Exclusion from the Application of the Laws and Regulation, but not in the Form of Self-Government

Some identity groups claim exclusion from regulations and laws in order to prevent assimilation and to promote diversity in the form of this legal exclusion. These are very controversial claims.

As already mentioned, Kymlicka discusses these claims as part of "polyethnic" rights. As he says, such claims are based on the grounds that compliance with mainstream laws disadvantages some people, given their religious practices.[102] Kymlicka goes on to discuss the issue of public holidays, government uniforms,

98 *Id.*
99 *Id.*
100 *Id.* (these rights should be seen falling more within the rights to secure belonging I discussed in Chapter 3).
101 *Id.*
102 *Id.* He goes on to provide the following examples: "[f]or example, Jews and Muslims in Britain have sought exemption from Sunday closing or animal slaughtering legislation; Sikh men in Canada have sought exemption from motorcycle helmet laws and from the official dress-codes of police forces, so that they can wear their turban; Orthodox Jews in the United States have sought the right to wear the yarmulke during military service; and Muslim girls in France have sought exemption from school dress-codes so that they can wear the chador." *Id.*

and symbols, and he argues that it may be possible to redesign them.[103] Kymlicka also asserts that it would be more difficult to have neutral schedules for schools and government offices. He finds that "there is no way to have a complete 'separation of state and ethnicity.'"[104]

The particularity of these identity claims is that they claim both exclusion and inclusion. In particular, such a claim includes elements of exclusion in the following sense; the groups claim to be excluded from the generally applicable rules. At the same time, the claim has elements of inclusion – the groups claim to be included in the society with this specific way. They claim a unique belonging in a larger community of equals with their own way, through their belonging in minority community/ies. While this is the meaning of their claims, the justification and limits of those claims in a democratic society are a distinct issue.

Other claims may be seen also to have both elements of exclusion and inclusion. The claims for immersion, for amelioration of a disadvantage rooted in history, and the other claims of non-assimilation and integration may include to some extent elements of exclusion. However, these claims – and most obviously the first ones – include primarily elements of inclusion. Even if to some extent they may claim distinctiveness , they include primarily elements of inclusion. Instead, the element of exclusion in the claims of exclusion of the generally applicable rules and laws is more dominant.

However, a different understanding of the above suggested element of exclusion in the claim of exclusion from generally applicable laws and regulations can be supported. This can be based on adopting a more substantive norm of equality or belonging. In this understanding, the claim for exclusions from the generally applicable laws and regulations is a claim to treat different situations in a different way. This is at least the essence of the claim. A different issue is whether there is indeed difference and need in the situation allegedly warranting different treatment, and whether this exact differential treatment is justified or not in a democratic society. The premise of their claim is that the generally applicable laws and regulations were designed upon an assumption which did not take into account their difference. Essentially, identical treatment disadvantages them. Thus, the claim to be excluded from the general laws, which otherwise will create a disadvantage of unequal belonging on the claimant, can be seen as a claim for accommodation of differences in order to provide equal belonging.

v. Self-Government Rights

The essence of self-government rights is the transfer of the decision-making center and jurisdiction to either political and territorial political units or other identity-based, non-territorial groups. Arrangements of this function can exist in many different forms with different areas of devolved powers, different

103 *Id.* at 115.
104 *Id.*

intensity, extent, character, in both unified states, with some kind of decentralization, and federal states. Watts looks at the "fundamental characteristics of a functioning federation." He does not find "a single pure model of federation that is applicable everywhere."[105] As he says,

> [r]ather, the basic notion of involving the combination of regional self-rule for some purposes and shared-rule for others within a single political system so that neither is subordinate to the other has been applied in different ways to fit different circumstances.[106]

One of the group differentiated rights that Kymlicka discusses is self-government rights. He sees two kinds of self-government rights. First, he identifies the main self-government rights. As he understands them; "[they] take the form of devolving political power to a political unity substantially controlled by the members of the national minority, and substantially corresponding to their historical homeland or territory."[107] Second, he identifies special representation rights. The latter can be a corollary to self-government rights. Both kinds of self-government rights are permanent.[108]

The self governance claims seem to fall within "the maintenance claims," identified by Magnet.[109] Magnet calls the groups who advance such claims "interior nations."[110] These groups "want to maintain their ancient cultures, not dissolve them into the mass of Canadian mainstream."[111] They demand for "institutions of their own-jurisdiction," and "they do not want to integrate into pan-Canadian institutions."[112] Magnet finds four maintenance claims in Canada: those of certain denominational communities,[113] English and French

105 Ronald L. Watts, *Comparing Federal Systems* 1 (2008).
106 *Id.*
107 *Id.* at 30.
108 Kymlicka, *above* note 10, at 32–33.
109 Magnet (2004), *above* note 83, at 227.
110 *Id.*
111 *Id.*
112 *Id.* (stating that, "[t]hey claim protection from the forces of mass economy and culture that erode their languages and cultures, and assimilate them into the undifferentiated mass of the surrounding society. Unlike the immigrant communities, they do not want to integrate into pan-Canadian institutions, which they fear as cauldrons of assimilation. Their demand is for institutions of their own-jurisdiction, governance machinery, justice systems, public enterprise, land, schools, health services and more. They want to maintain their ancient cultures, not dissolve them into the mass of Canadian mainstream.").
113 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 [U.K.] c.11, at § 29.

Rights respecting certain schools preserve

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools

See also article 93 of the Constitutional Act 1982.

linguistic minorities,[114] Aboriginal peoples,[115] and the national minority of Quebec.[116] He calls these populations the "constitutional groups."[117] Magnet sees all these claims as kinds of equality claims.

Thus, equal belonging in a society does not mean the same belonging for everyone in this society. Individuals are equals, but not the same. Instead, they are unique, and they are equals in their uniqueness. They belong in different identity and social groups, and they have different needs, preferences, and moral and spiritual perceptions. To enjoy an equal belonging means that you have the power/freedom to define the quality of your belonging. This is the purpose of the "free-identity" belonging in a society among people of equal worth: to be equally respected in your identity, be equally free to be true to yourself and to define yourself. Under these circumstances consequently, you define your belonging in the public relationship as a member of a group of people of equal worth. Justice is thus contextual. It should respond to different injustices and needs, taking the appropriate shape that each particular situation requires. Whatever contextual process and route is needed, the result to be achieved is universal: the good of equality and justice. The different claims advanced indicate a variety of remedies needed for the assortment of types of disadvantage (and the different needs and challenges people may face), in order to achieve a universal right: *the right to belong in a society of members of equal worth/equals.*

III. Criteria for Legal Assessment of Identity Group Differentiated Rights

How then can all the above considerations, concerns and responses which indicate the debate over the politics of identity and difference inform the judicial review and policy making when an *identity group differentiated claim or right* is involved in judicial analysis? I suggest four general criteria for their assessment. The first criterion relates to personal uniqueness and autonomy. The second relates to the representativeness of this claim or right to the real interests of the beneficiaries. I identify here an equality argument, which is a two-fold trust-based criterion to assist the measurement of the representativeness. The third criterion relates to the remedial function of the identity group differentiated claim or right. The fourth criterion relates to the question of whether the right respects the minimum internal liberalism. I discuss them in turn.

114 *Canadian Charter*, at §§ 16–20 and 23.

115 *Canadian Charter,* at § 25 and Article 35 of the Constitution Act 1982.

116 *See e.g.*, for the historical roots of the minority, the related framework piece of legislation and the coordinating federal government agencies, as well as the main concepts used in articulating claims including bilingualism, duality, (asymmetric) federalism, distinct society and nationhood in Kymlicka, *above* note 50, at 40, 49–52.

117 Magnet (2004), *above* note 83, at 230.

i. Personal Uniqueness and Autonomy of the Beneficiaries?

The first criterion of the theory is illustrated in the following question: "How much does 'the identity group differentiated claim or right' express the Personal Uniqueness and Autonomy of the beneficiaries?"

It would be useful to start the analysis by looking at the five identity-group differentiated claims or rights in this chapter and how this criterion may be applied to each of them. I look first at the programs that aim at immersion and integration, amelioration of a disadvantage rooted in history and those which aim at preventing assimilation and promoting integration. All the above kinds of measures respect the personal uniqueness and autonomy of the beneficiaries, as long as they are designed in a respectful way for the identity of the beneficiaries, and in a responsive way to the need of the beneficiaries. Then, the claims for exceptions from laws and regulations and self-government rights can also satisfy this criterion. In particular, they can express the uniqueness of the claimant, if they realize how the beneficiaries wish to belong in the larger society. It is natural that the criterion of personal uniqueness and autonomy can be applied to all the above identity group differentiated rights or claims, as it constitutes the first theoretical premise of "the right to 'free-identity' belonging," to which all these more specific rights or claims are or can be parts of.

All the above identity group differentiated rights or claims, except for self-government rights, can find a legal basis in Article 27 of the International Covenant on Civil and Political Rights. Article 27 provides:

> [i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Canadian Multiculturalism Policy of 1971 is the "first formal multiculturalism policy in the world."[118] In 1976, Canadians ratified the International Covenant on Civil and Political Rights of 1966.[119] They adopted multiculturalism as a part of the Charter of Rights and Freedoms six years later, in 1982. Section 27 stipulates that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

The model for section 27 of the Charter was Article 27 of the Covenant on Civil and Political Rights.[120] Magnet finds that "Canadian multiculturalism

118 Magnet (2005), *above* note 83, at 440.

119 International Covenant on Civil and Political Rights, December 16, 1966, U.N.T. S. No. 14668, vol 999 (1976), p. 171.

120 Magnet (2005), *above* note 83, at 443. Magnet examines article 27 of the Covenant on Civil and Political Rights finding that this "casts light on the meaning of

policy builds on three broad platforms: recognition of diversity, civic participation and social justice."[121]

Magnet discusses the relation of these two provisions. As he reports, Article 27 of the International Convention of the Civil and Political Rights is the precursor of section 27 of the Canadian Charter.[122] Comparing the two provisions, he finds that while the first is a "free standing" provision, the latter "must be applied as an interpretational tenet." However, he notes that "[o]nce implicated by a claim under another Charter right or freedom, section 27's scope and strength of application should exceed the structural limits of its international counterpart."[123] He also sees a possibility that international experience can help the Canadian experience and vice versa, "allowing the two provisions to develop in symbiosis."[124]

As has been reported, there was no agreement among the founders of the Canadian Charter of what multiculturalism means.[125] Some of the supporters multiculturalism should be in the preamble, while others suggested it as a substantive provision of the Charter. But a third option was adopted. Section 27 of the Charter has been accepted as an interpretative provision.[126] Magnet views that "freedom from discrimination and group survival are important elements of the constitutional background which ultimately led to entrenchment of section 27."[127]

Canadian scholars have proposed both a weak and a more rigorous reading of section 27 of the Charter. In a weak reading of section 27, it does not itself create rights. In the weakest version of this reading, section 27 was seen as "a rhetoric flourish," rather than an operative provision.[128] It seems that the prevailing reading of section 27 by the Canadian courts has been to see it as an interpretational principle of rights. The court relies on section 27 of the Charter "to shape the meaning of fundamental freedoms and language

section 27 of the Canadian Charter." *Id.* at 443. He also cites jurisprudence which supports the use of international human rights instruments in Charter interpretation and provide the grounds for referring to them. *Id.* at n. 36.

121 Magnet (2004), *above* note 83, at 226.

122 *e.g.* Magnet and Power, *above* note 83, at 388, 422.

123 Magnet, *above* note 492, at 452.

124 *Id.* at 453.

125 *Id.* at 438, 442.

126 *Id.* at 442, n.31.

127 *Id.* at 441.

128 Peter W. Hogg, *Constitutional Law of Canada and Canada Act Annotated* 72 (1981), cited in Magnet (2005), *above* note 83, at 436; *See also* at 437, n. 13 (where Magnet goes on to refer to M.R. Hudson who characterized section 27 as a "barrier to discrimination that may be redundant in light of s.15, or a collective right which may be too vague to benefit any group.").

See also Peter W. Hogg, *Constitutional Law of Canada Act Student Edition* (2011). It is noteworthy that Hogg in the 2011 student edition of his book does not devote any separate section analyzing section 27 of the Charter. Surprisingly, he does not even mention it in the analysis of the right to religion, in connection to which the principle of multiculturalism has been used by the courts.

rights."[129] Magnet explains that section 27 is an interpretational rule and it is defensive in terms ("preservation … of the multicultural heritage of Canadians"). In that sense, it has shielding effects.[130] Ayelet Shachar confirms more recently that section 27 of the Canadian Charter has been seen as a rule of interpretation.[131] She sees it as a section of interpretation, which "expresses core values of Canadian society and its constitutional order."[132] Therefore, section 27 of the Canadian Charter has been seen as a provision of interpretation, rather than as a self-sufficient rights provision.

However, within the understanding of section 27 of the Canadian Charter as a rule of interpretation, a more rigorous reading of section 27 has also been proposed. Magnet suggests that section 27 differs from the other interpretation provisions of the Charter, because "it is also dynamic." He notes that "[i]t requires those responsible for applying the Charter to contribute to the 'enhancement' of Canadian multiculturalism[.]"[133] He sees section 27 as "a seeming reference to positive action."[134] Therefore, Magnet sees an "independent substance" in section 27.[135] Beaudoin and Mendes also perceive the section as providing interpretative assistance.[136] With this understanding, they suggest that "the goals of section 27 so obviously require special measures to preserve multicultural heritage against the forces of assimilation."[137] In their view, "the section supports the approach that the Supreme Court of Canada has taken in recognizing the accommodation of differences,"[138] as well as, "the idea that s. 15 is not purely individualistic."[139] While the understanding of section 27 by Magnet and Beaudoin and Mendes is more substantive than "a rhetoric flourish," it does not seem that they understand section 27 as a self standing rights provision. Their reading of section 27 can be more precisely described as a dynamic and substantive [equality] interpretative rule.

129 Magnet (2005), *above* note 83, at 437.
130 *Id.* at 435.
131 Ayelet Shachar, "Interpretation Sections (27 and 28) of the Canadian Charter" *in* Errol Mendes and Stéphane Baulac, *Canadian Charter of Rights and Freedoms Charte Canadienne des Droits et Libertés* 147–190 (2013).
132 *Id.* at 148 (stating that "[w]hile not entrenching particular rights, these interpretative provisions express core values of Canadian society and its constitutional order[.]").
133 Magnet (2005), *above* note 83, at 435.
134 *Id.*
135 *Id.* at 436.
136 Gérald-A. Beaudoin and Errol Mendes, *Canadian Charter of Rights and Freedoms* 1011–1012 (2005) (stating that it, "[s]ection 27, which specifies that the Charter be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians, provides valuable assistance in interpreting 1012 section 15.").
137 *Id.* at 1012.
138 *Id.*
139 *Id.*

An even more rigorous reading has been suggested by Faisal Bhabha.[140] In his effort to provide a judicial theory for section 27, he relies on the two themes of non-discrimination and group survival identified by Magnet.[141] He suggests that the section should be seen to protect both autonomy without self-government[142] and internal protections for vulnerable members of minority groups.[143] He also views human dignity as a limiting principle for group rights.[144] Therefore, he proposes a more substantive reading, which appreciates that certain rights are required by section 27.

There has not yet been a comprehensive theory about the interpretation of section 27 of the Charter, but the prevailing view is to approach it as an interpretative rule with a more or less substantive and dynamic nature.[145] What is suggested, as a minimum interpretation of the provision, is that multiculturalism should inform the judicial review at least as an interpretational principle. Based on a weak reading of this provision, it can be seen as an interpretation provision. In this reading, the principle of multiculturalism penetrates each rights provision, adding or confirming the multicultural aspect in its scope of protection. The principle of multiculturalism creates, at least, legitimate expectations for belonging to a multicultural society or adding specific multicultural content to all the other rights. The principle, in its most rigorous reading, creates self-standing rights. In other words, in a weak reading where multiculturalism is not a self standing rights provision, this principle promises to people, without being a self standing right provision, that they can belong to a certain society, while celebrating their cultures. This is close to Magnet's suggestion for section 27 of the Canadian Charter as a dynamic and substantive interpretative rule. However, this reading should, in my opinion, be seen as the minimum reading of the provision.

The above use of multiculturalism in judicial review and policy-making is suggested not only when it takes place in Canada or in a State which has ratified Article 27 of International Covenant on Civil and Political Rights. It is suggested also when judicial review and policy making takes place in all the remaining States. The reason is because the theoretical foundation of multiculturalism is the universally accepted moral and legal grounds of personal uniqueness, autonomy, equal worth, as well as, the fact of the relational feature of human life. Multiculturalism has, therefore, the same theoretical foundations

140 Faisal Bhabha, "Between Exclusion and Assimilation: Experimentalizing Multiculturalism" 54 McGill L.J. 45 (2009).

141 *Id.* at 49.

142 *Id.* at 58–61.

143 *Id.* at 61–62 (going thus beyond Kymlicka's skepticism of internal restrictions).

144 *Id.* at 62–64.

145 Mahe v Alberta [1990] 1 S.C.R. 342, 453(Can.). As Magnet says in 2005, "[i]t is hard to see any coherent doctrine maturing around section 27 at this stage of Charter litigation; the work of Canadian courts displays considerable ambiguity and some contradiction." Magnet, *above* note 83, at 453.

See also, e.g., Shachar, *above* note 131, at 147–190 (proposing a theory for section 27).

as the *right to* "free-identity" belonging. Are the meanings of multiculturalism and the *right to* "free-identity" belonging the same? They point, if not always, at least sometimes, in the same direction.

ii. Representativeness

The second criterion in the theory of the *right to* "free-identity" belonging can be illustrated in the following question: how much does "the identity group differentiated claim or right" express representation of the interests of the beneficiaries? It would be useful to start the analysis by looking again at the five identity group differentiated claims or rights identified above in Section II, and how the suggested criterion of representativeness may be applied to each of them.

All of the "identity group differentiated claims or rights" of Section II can be representative of the beneficiaries, under these general conditions: (a) as long as they are designed in such a way as to respond to the real interests and needs of the beneficiaries, and (b) the particular design of policy had been a result of effective consultation or a participatory process with the beneficiaries. In other words, the issue of representativeness can arise if the policies are designed without the beneficiaries having a trustworthy proximity with the decision-makers and the decision-makers lacking knowledge about the real needs of the claimant. They can be representative, if the beneficiaries have a trustworthy proximity with the designers of the program and if the decision-makers know their real needs (or the decision-makers have been consulted by the beneficiaries or the latter have participated in the decision making process in an effective way).

I find that there is an equality argument to make here, which is based a two-fold trust criterion. The first aspect is based on trust and absence of conflict of interest between the beneficiaries and the decision-makers. The second aspect is trust based on the feeling of the beneficiaries that the decision-makers know their real needs. We can understand this two-fold trust criterion as part of a virtual *Power of Attorney* between the representative and the represented, the *Trustee* and the *Trustor*, who is also the *Beneficiary*. The first aspect of the criterion can be seen as representing a first family of terms of the *Power of Attorney*, which is based on the belief that the representative/trustee will not act to the detriment of the *Represented/Trustor/Beneficiary*. The second aspect of the criterion can be seen representing a second family of terms of the *Power of Attorney*, which is based on the belief that the representative has adequate knowledge to represent the interest of the represented.

Before analyzing this two-fold trust criterion further, it is necessary first to define how I understand trust. Trust is understood as the belief in someone from whom one expects something good. It is a belief which negates doubt for this person, providing a comfort in expecting that the trustee will act for one's good. This definition is reminiscent of Hobbes's definition of trust. As he says,

> [t]rust is a Passion proceeding from the Belief of him from whom we expect or hope for Good, so free from Doubt that upon the same we pursue no other Way to attain the same Good: as Distrust or Diffidence is Doubt that maketh him endeavor to provide himself by other means.[146]

If Hobbes uses the word "passion" to mean something that is not the result of a conscious reasoning and a cognitive process, but just an emotional situation where let's say, "the brain is not in the heart," then my definition is different from Hobbes'. Trust in my definition is not a passion which is based on a belief. Generally, indeed, trust can be a passion. However, this is not the kind of trust I am talking about. Trust is understood here as a result of a cognitive process, a conscious and rational consideration, reasoning, and assessment[147] of many contextual factors in the relationship between the representative/trustee and the *Represented/Trustor/Beneficiary*. This kind of trust has as a result the genesis of certain expectations, which are based on consciousness, rational consideration, reasoning, and assessment of the surrounded context of the relationship of the *Representative/Trustee* and the *Represented/Trustor/Beneficiary*.

I will now examine this two-fold trust criterion more closely.

(a) Trustworthy Proximity with Decision Makers

The first equality argument is based on the necessary trust one needs in the decision-makers to care for his/her interests. For *the right to equal belonging*, it is necessary that there is such substantive proximity to the decision-makers that the *Trustor/Beneficiary* can feel secure[148] and free to be her/himself. The proximity which is necessary can not be determined in abstract, but only in context. The principle for the contextual assessment is the need for such proximity to the decision-makers as to develop a feeling of trust that they will take care of the *Trustor/Represented*' s interests. In the case that there is a conflict of interest it is difficult to develop such trust. The criterion of trustworthy proximity serves the need to protect the minority against the effect of measures adopted to suit the needs of the majority, avoiding the danger of the tyranny of the majority. While a danger of the tyranny of majority goes with distrust, a democratic belonging goes with trust.

146 Melissa S. Williams, "Voice, Memory, Trust: Marginalized Groups and the Failings of Liberal Representation," 31 (1998) (quoting "Human Nature," *in* the *Moral and Political Works of Thomas Hobbes of Malmesbury* (London, 1750), quoted in John Dunn, "Trust and Political Agency," *in Trust: Making and Breaking Cooperative* 74 (Diego Gambetta ed., Oxford; Basil Blackwell, 1988)).

147 The distinction of an act under passion (a sudden strong impulse) from an act under rational consideration is very well established in the law *see, e.g.*, the distinction of the crime of passion from the premeditated crime.

148 See for *the right to secure belonging in a community of equals* in Chapter III.

This criterion can be seen to find expression in a combination of insights by Hanna Pitkin and Melissa Williams. Hanna Pitkin, defined political representation as follows:

> [r]epresenting here means acting in the interest of the represented, in a manner responsive to them. The representative must act independently; his action must involve discretion and judgment; he must be the one who acts. The represented must also be (conceived as) capable of independent action and judgment, not merely being taken care of. And, despite the resulting potential for conflict between representative and represented about what is to be done, that conflict must not normally take place.[149]

As Williams adds: "[i]n the absence of the trust, or in the face of a failed trust, a betrayal, reason dictates that we must act on our own behalf."[150]

Therefore, if some reasons exist which trigger suspicions and distrust between "the representative/trustee" and *the Represented/Trustor/Beneficiary, the Power of Attorney* should be considered violated. Under this virtual *Power of Attorney*, there should be no conflict of interest for the powers delegated to the *Trustee/Representative*. If there is, then, the *Power of Attorney* is no longer valid. In this case, there is no real representation, because there is no relationship of trust.

This idea of the need of trust has been very well explained by the Supreme Court of Canada, which emphasized on numerous occasions the need to protect the minority. As the Court stressed, in *Arsenault-Cameron v Prince Edward Island*,[151] section 23 of the Charter was intended in part to protect the minority against the effect of measures adopted to suit the needs of the majority.[152] In *Arsenault-Cameron* the Supreme Court of Canada held that the numbers of French speaking children in Summerside, Prince Edward Island, warranted education in French and under these circumstances, section 23 of the Charter created a constitutional obligation of the Province to establish a French language school.[153] Furthermore, in *Mahe v Alberta*[154] the Court held that the protection of the education rights of the children of the official

149 Williams, *above* note 146, at 24 (quoting Hanna F. Pitkin, *The Concept of Representation* 209 (1967)). Pitkin goes on to explain: "[t]he representative must act in such a way that there is no conflict, or if it occurs an explanation is called for. He must not be found persistently at odds with the wishes of the represented without good reason in terms of their interest, without a good explanation of why their wishes are not in accord with their interest." Pitkin 209–10 (1972).*See also* Anne Phillips, *The Politics of Presence* 4 (1988) (sharing Pitkin's definition for Representation, and quoting Pitkin, at 209).

150 Williams, *above* note 146, at 31.

151 Arsenault-Cameron v Prince Edward Island, 2000 SCC 1[2000] 1 S.C.R. 3 (Can.).

152 *Id*. at para.57.

153 *Id*. e.g., at paras.59–63.

154 Mahe v Alberta [1990] 1 S.C.R. 342(Can.).

language minority provides their parents with the right of representation on the school board or to have board of their own. In this case, the Court did not lose sight of the historical context in which s. 23 was enacted. Looking at this directive, Dickson C.J., stated that s. 23 suggests that, "minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns."[155] He went on to emphasize that "[s]uch neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority."[156] As it was also stated, "[a] provincial government that provided equal access to all citizens to minority language schools would not be 'do[ing] whatever is practically possible to preserve and promote minority language education.'"[157]

The suggested criterion of trustworthy proximity is not to be confused with the argument of mirror representation. In that idea, "the legislature is said to be representative of the general public, if it mirrors the ethnic, gender or class characteristics of the public."[158] The argument of trustworthy proximity is not suggested as a complete representation theory. It is suggested as one of the relevant criteria that the judge should take into account, when she/he assesses group differentiated measures, and/or claims and/or rights. It does not suggest a mirror representation; it argues for a trustworthy relationship with the representatives; it sees trust as a measure of representativeness, and thus, equal

155 *Id.* (confirmed also in Reference re Public Schools Act (Man.) at p. 851(quoting a relevant observation on the Court in Mahe reasoning by M.A. Green in "The Continuing Saga of Litigation: Minority Language Instruction" (1990–1991), 3 *Education & Law Journal* 204, at pp. 211–212) and at p. 862; quoted in Arsenault-Cameron v. Prince Edward Island, 2000 SCC 1, at para. 43 (stating that "the essential question is that of determining whose opinion should prevail in circumstances such as these.").

156 *Mahe*, [1990] 1 S.C.R. 342, at 372 confirmed and quoted in Reference re Public Schools Act (Man.) at p. 862; in Gosselin v Quebec, at para. 32, quoted in Arsenault-Cameron v. Prince Edward Island, 2000 SCC 1, at para.43. *See* also for a similar observation in Arsenault-Cameron v. Prince Edward Island, 2000 SCC 1, at para. 54. *See also* a similar statement by M.A. Green *above* note 155, describing what the Court in Mahe conceded, quoted in Reference re Public Schools Act (Man.), *above*, at p. 851.

157 Arsenault-Cameron v. Prince Edward Island, 2000 SCC 1, at para.26, quoted in *Gosselin*, 1 "Canada" 2002 SCC 84, at para. 32. *See also* (*stating that* "[l]ack of meaningful participation in management and control of local school boards by the Francophone minority made … [various setbacks experienced by the minority] possible" where the reference is made to Reference Re Education Act of Ontario and Minority Language Education Rights (1984), 10 D.L.R. (4th) 491, at p. 531 and to a similar observation in Prince Edwards Island in Reference Re Minority Language Educational Rights (P.E.I.) (1988), 69 Nfld. & P.E.I.R. 236, at p. 259 on the risk, which exists in case sole control is left with the majority language group, to "wreak havoc" upon the rights of the minority and render such a right worthless. *Id.)*.

158 Kymlicka, *above* note 10, at 138 (describing the argument by other commentators while he discusses the arguments for the rationale of group representation).

belonging in a democratic society. My argument is not that there is always "a conflict of interest" among members, who belong to different groups, nor that such conflict there can be only among members of different group.[159] My argument is that a potential conflict of interest can exist among members of different groups, as well as among members within certain identity group, when a good reason triggers a belief that there can be a conflict of interest.

The question is "whether each time there is a trustworthy relationship between the *Trustee/Representative* and the *Trustor/Represented*, that there is not conflict of interest." Then, the *Trustor/Represented* can be the *Beneficiary* of the virtual *Power of Attorney*. I began the discussion of this *Power of Attorney* and the issues of representativeness in Chapter II.

(b) Proximity and Understanding of Needs

This equality argument is based on the beneficiaries' need of the belief about the ability of the representatives to fully understand their needs. In this view, the lack of knowledge of the needs of a minority is seen as a source of a danger for the tyranny of the majority and distrust. People with different narratives and experiences may not be able to really fully understand and represent needs which are based on different narratives and needs.

This idea can also be found in the jurisprudence of the Supreme Court of Canada. In particular, Lamer C.J., emphasized that,

> in implementing such a scheme of minority language education, the province must expressly address a number of issues in order to satisfy its constitutional obligations and remain true to the purposive, remedial nature of s. 23. A proper implementation will require the fullest understanding of the needs of the French-language minority … The participation of minority language parents or their representatives in the assessment of educational needs and the setting up of structures and services which best respond to them is most important.[160]

The Court, formulating its above reasoning, took into account the statement made in *Mahe* that the "majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority."[161] Indeed, in *Arsenault-Cameron* the majority of the Court observed that the Minister and the representatives of

159 *Id.* at 139 (describing the arguments by other commentators as a justification of the [mirror] group representation).

160 Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), 1993 SCC 119, [1993] 1 SCR 839, at p. 862 (Can.) The Court even if it refrained from taking a position on the constitutional validity of Manitoba's proposed legislative scheme, it provided, in a let's say obiter dictum statement, significant guidelines for the provincial legislature and policymakers.

161 *Mahe v Alberta* [1990] 1 S.C.R. 342 (Can.).

the minority did not understand the needs of the minority in the same way. In particular, the Court pointed out that neither the pedagogical needs nor the transportation requirements were understood in the same way.[162]

A similar argument about knowledge and understanding has been already advanced as another argument in the defense of group representation.[163] Minow worries that this argument may turn to a "self fulfilling prophesy." Kymlicka shares the same worry of providing the majority "an excuse" not to try to understand the needs of the minority.[164] Williams points out that "representation requires that we recognize the agency of the represented; the agency of the representative; and the fact that the represented have real, discernible interest of which both they and their representative can be aware."[165]My argument is that the knowledge based argument is only one among other arguments needed to be taken into account by the judge, while assessing group differentiation measures and/or claims and/or rights. It is an argument suggested as a part of a theory of the *Right to Equal Belonging in a Democratic Society*. It serves the theory of two inherent rights in the *right to equal belonging*; the *right to secure belonging in a community of equals*, which was discussed in the previous chapter, and/or the right to "free-identity" belonging *in a community of equals*, discussed in this chapter. My suggestion does not specify certain people who can or cannot have this required knowledge of all the circumstances and all areas of decision making. This book offers a model of analysis and not an application of the theory in specific cases.

Arguments based on absence of both conflict of interest and knowledge have been advanced to defend a mirror representation theory. Kymlicka discussing the mirror representation theory finds some truth in both arguments, while he indeed advances some objections to both of them.[166] His objection is that the mirror representation theory in "its conclusion" cannot be seen as a complete theory.[167] In particular, he finds that "it remains unclear how to resolve the conflict between mirror representation and democratic accountability."[168]He thus sees that the mirror representation theory in its conclusion

162 Arsenault-Cameron v. Prince Edward Island, 2000 SCC 1, para.49 [2000] 1 S.C. R. 3 (Can.).

163 Kymlicka, *above* note 10, at 138–139 (discussing Philips 1994: 76).

164 *Id.* at 139 (providing also the example interpretation of the Maori's guaranteed seats by the non-Maori "as absolving them from any responsibility to take an interest in Maori affairs" and citing also Minow).

165 Williams,*above* note 146, at 24.

166 Kymlicka, *above* note 10 (stating that, "[t]hese objections do not prove that the members of one group can in fact understand and therefore represent the interests of the members of other groups who have significantly different experiences or characteristics.").

167 *Id.* at 140 (stating that "[t]aken to its conclusion the principle of mirror representation seems to undermine the very possibility of representation itself … These difficulties suggest that the idea of mirror representation should be avoided as a general theory of representation.").

168 *Id.* at 139.

has "a number of infirmities"[169] to be suggested as a general and complete theory of representation.

The conclusion of my analysis is not a "mirror representation." My conclusion is closer to Young's conclusion:

> [i]n a society where some groups are privileged while other are oppressed, insisting that as citizens persons should leave behind their particular affiliations and experiences to adopt a general point of view serves only to reinforce the privilege; for the perspective and interests of the privileged will tend to dominate this unified public, marginalizing or silencing those of other groups.[170]

Therefore, trust and knowledge are suggested as criteria for the judicial assessment of "identity group differentiated rights" as equality claims. Trust and knowledge in decision making are equality arguments. They relate to a relationship of the represented with substantive proximity to the representatives and decision makers, which permits trust that the representatives will take care of the real interests of the non privileged ones, as well as understanding their real needs. Trust and knowledge relate to the representativeness, which is a constituent element of equal belonging in a democratic society. Therefore, the conclusion of my analysis is that we have a legal right not to "mirror representation," but to *Democratic Belonging*.

iii. Remedial Nature

The third criterion of the theory of identity group measures and/or claims and/or rights can be illustrated in the following question: how remedial is the identity group differentiated claim or right? Personal autonomy is often intertwined with community empowerment. Identity free belonging can have a remedial function, in the sense of remedying non recognition of a vital community a person belongs to. Non recognition of such a community causes personal damage.

The criterion of remedial nature seems to apply to all of the five "identity group differentiated claims or rights," although in a different way. Look at both programs which aim at immersion and integration, as well as, programs which aim at amelioration of a disadvantage rooted in history and promotion of integration. These can be remedial if they improve a disadvantage of the beneficiaries. Such measures should be seen as an expression of *the right to equal belonging*. They actually fall both within *the right to secure belonging*, discussed in the previous chapter, and within the *right to* "free-identity" belonging. In particular, they can fall within *the right to secure belonging*

169 *Id.*
170 *Id.* (citing Young, 1989: 257).

providing they ameliorate a disadvantage, which otherwise would make them vulnerable to political, economic and social oppression mainly in the forms of prejudice, stereotype, perpetuation and/or worsening of a pre-existing disadvantage and ineffective and illusory political participation. Without ameliorating this disadvantage, their belonging could not be safe/secure, in the sense developed in the previous chapter. Such measures can also fall within the *right to* "free-identity" belonging, under the following condition; they try to ameliorate a disadvantage which affects identity. They provide the message that you can follow a realistic and respectful identity path to achieve participation in society. Not knowing the language of the larger society does not humiliate your identity. It is something to work on. It is a challenge and an opportunity to learn something new and grow within this process. This is one example of a category of measures, where the *rights to secure* and "free-identity" belonging cannot really stand separate from each other.

The above considerations can be also applicable to claims or rights for amelioration of a disadvantage rooted in history and integration. Further ideas relating to the issue of time can be added. The issue of time, discussed in Chapter 3, also contributes to making these claims different from other remedial claims for different kinds of disadvantage. The insult and trauma in these cases is deeper. It is an ongoing trauma with spill over effects both to primary and secondary victims. It finally becomes a characteristic of society as it affects the relationships of all the members of society. These claims usually relate to a remedy of a disadvantage of exclusion and a damage to identity and human dignity. The right to amelioration of such a disadvantage is a part of the remedy for a deep scar, pain and daily strife.

Furthermore, the claims for preventing assimilation but promoting integration can also be remedial. Such measures would ameliorate the disadvantage of culture insecurity in a larger society with different cultures and identities. The claims for exceptions from laws and regulations and self-government rights can be also remedial. In this case, the measures ameliorate the beneficiaries' disadvantage, because generally applicable laws and regulation or the central government do not or are perceived not to take into account their own beliefs, cultures or identities. Such regulations or laws have allegedly been designed based on an assumption which ignores or insufficiently takes into account their different needs. Both the above kinds of "identity group differentiated rights" can be a part of a process of remedying a respective kind of disadvantage.

Therefore, it is suggested that an additional equality argument and criterion for the judge to assess "the identity group differentiated claims or rights" is their remedial function and their aim to alter the status quo. Equality is transformative, because it can alter the status quo.

For instance, the idea of the remedial function of the right to management and control in education has been very clearly expressed in the jurisprudence over section 23 of the Canadian Charter. As the Supreme Court of Canada stated in *Mahe*, section 23 "was designed to remedy an existing problem in

Canada, and hence to alter the status quo."[171] It is not meant to reinforce the status quo by adopting a formal vision of equality that would focus on treating the majority and minority official language groups alike.[172] The framers of section 23 of the Charter were concerned with the regimes governing the Anglophone and Francophone linguistic minorities in various provinces in Canada with regard to the language of instruction and their history. According to the Court, "their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely those contained in s. 23 of the Charter …"[173]

The idea that section 23 is intended to be a a solution to a certain problem is clear also in *Gosselin v Quebec (AG)*.[174] In *Gosselin*, it was the right to an adequate level of social assistance which was at stake. Louise Gosselin, who was under 30, challenged a law in Quebec excluding citizens under 30 from receiving full social security benefits. She brought a class action under sections 15 and 7.[175] The Court, there, trying to explain why rejecting free access to minority language education to members of the majority language group first describedfirst the problem the framers of section 23 tried to solve. Then, the Court, through a contextual reasoning, stated that "if the problems are different, the solution will not necessarily be the same."[176]

Furthermore, again in *Mahe*,[177] the Court explained that one of the two main reasons,[178] management and control, are critical to the enjoyment of the section 23 right, because of the significance of their corrective function.[179] As it has been observed, empowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns.[180] The "history reveals that section 23 was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the 'equal partnership' of the two official

171 Mahe v Alberta [1990] 1 S.C.R. 342,363 (Can.) (confirmed and quoted in Reference re Public Schools Act (Man.), *above* n 161, at 858).
172 *See id.* at 378, quoted in Arsenault-Cameron v. Prince Edward Island, 2000 SCC 1, para. 31 [2000] 1 S.C.R. 3, where the Court analyzes the "notion of equality".
173 *Id.* at 363. The Court went on to refer at this point also to Lavoie v. Nova Scotia (Attorney General) 91 N.S.R. (2d) 184 (N.S.C.A.), at p. 193 (1989).
174 Gosselin v Quebec (AG) 2002 SCC 84, [2002] 4 S.C.R. 429 (Can.)
175 Section 15 being the provision of equality rights and section 7 of the Canadian Charter being the provision of the right to life, liberty and security of the person.
176 *Gosselin*, l "Canada" 2002 SCC 84, at para.31.
177 Mahe v Alberta [1990] 1 S.C.R. 342.
178 *Id.* at 362–362 (the first reason being the preservation and enhancement of minority language education and culture.)
179 *Id.* at 363–364.
180 Arsenault-Cameron v Prince Edward Island, 2000 SCC 1, para. 45, [2000] 1 S.C.R. 3 (Can.).

language groups in the context of education."[181] It seems that empowerment in the form of the right to manage and control education was chosen as the way to correct the real defects, remedy past injustices and alter the status quo. Therefore, the Court in *Mahe* calls to construct the right of management and control "remedially, in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection for minority language rights."[182] As it has been observed, "if section 23 is to remedy past injustices and ensure that they are not repeated in the future, it is important that the minority have a measure of control over both facilities and instruction."[183] Therefore, the empowerment of the minority parents was perceived as the responsive remedy to a certain past injustice.

The self-government rights and the exclusion of the generally applicable rules can also be remedial. One of Kymlicka's arguments, defending the group-differentiated rights he identifies, is an equality argument.[184] In particular, Kymlicka advances an equality argument for all group differentiated rights, he identifies. He explains the remedial function of group differentiated rights more generally, emphasizing the need for the protection of minority cultures. He, therefore, emphasizes that the group differentiated rights compensate for what "majority cultures take for granted."[185] For example, in respect of self-government rights, he explains how such rights can be compensatory:

181 *Mahe*, [1990] 1 S.C.R. 342, at 364; *Arsenault-Cameron*, 2000 SCC 1, para. 26. *See also Mahe*, [1990] 1 S.C.R. 342, at 363 (reporting the history in the minds of the framers, as it was the limitation of instruction in French in separate schools of Ontario (this regime being regulated by Regulation 17) and that the regime was based on Bill 101 and the legislation which preceded it in Quebec).

182 As the Court has described in Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), 1993 SCC 119, [1993] 1 SCR 839, at p. 850 (Can.).

183 A statement by M.A. Green in "The Continuing Saga of Litigation: Minority Language Instruction" 3 Education & Law Journal 204, 211–212 (1990–1991), (describing what the Court in Mahe conceded, quoted in *Reference re Public Schools Act (Man.)*, 1 SCR 839, at 851).

184 Kymlicka, *above* note 10, at 108–116. *See* for the other arguments, at 116–126 (the other arguments being based on "the role of the historical agreements," the "value of the cultural diversity" and "the analogy with states.").

185 *Id.* at 126. As he says: "[h]owever, minority cultures in multination states may need protection from the economic or political decisions of the majority culture if they are to provide this context for their members. […] While these group-differentiated rights for national minorities may seem discriminatory at first glance, since they allocate individual rights and political powers differently on the basis of group membership, they are in fact consistent with liberal principles of equality. They are indeed required by the view, defended by Rawls and Dworking, that justice requires removing or compensating for undeserved or 'morally arbitrary' disadvantages, particularly if these are 'profound and pervasive and present from birth' (Rawls 1971: 96). Were it not for these group differentiated rights, the members of minority cultures would not have the same ability to live and work in their own language and culture that the members of majority cultures take for granted. This, I argued, can be seen as just profound and morally arbitrary a

> group-differentiated self-government rights compensate for unequal circumstances which put the members of minority cultures at a systemic disadvantage in the cultural market-place, regardless of their personal choices in life. This is one of many areas in which true equality requires not identical treatment, but rather differential treatment in order to accommodate differential needs.[186]

Therefore, Kymlicka finds that self-government rights can be defended as remedial differential treatment. However, not all the claims over self-government and the exclusion from the generally applicable rules may have any or the same remedial function. To answer this question in a certain case a contextual assessment is required.

Recognition of a group membership is a form of belonging, which can be remedial to the dangers of a certain type of oppression. When this group membership involves strong identity issues and a remedial function, recognition is linked to the freedom to be true to yourself having a respectful identity and identity freedom and/or unique belonging among members of equal worth of the larger society. This is the essence of the right to "free-identity" belonging.

iv. Minimum Internal Liberalism?

The fourth suggested criterion in the theory of the *right to* "free-identity" belonging can be illustrated by the following question: how much does the identity group differentiated claim or right respect *minimum internal liberalism*? The criterion of internal liberalism relates only to claims by a person who is intended to be a beneficiary of the identity group differentiated right. In these claims, individuals who are intended to be beneficiaries find that the program is oppressive or discriminatory for them. The issue of minimum internal liberalism can arise in all five identity group differentiated claims or rights. It depends on the particular design of the policy, but also the administration and application of the policy. The question is whether any of the five types of an identity group differentiated claims or rights can be oppressive or discriminatory to some members of the same identity group.

When individuals who are intended to be beneficiaries, find that the program is oppressive or discriminatory for them, there are good reasons to examine such a claim under a very high standard of judicial review. Such allegations should trigger suspicions, which the judge needs to review very carefully, so as to protect from internal oppression. Even in the case that a right to exit is provided, this is not sufficient to leave the presumption of constitutionality unaffected. Furthermore, the idea of increasing the judicial review intervention

> disadvantage as the inequalities in race and class that liberals more standardly worry about."

186 *Id.* at 113.

should be assessed with regard to the fact that the intended beneficiaries are themselves the complainants. However how rigorous the judicial review should be may be a matter to be solved in relation to a theory of separation of powers in a democratic society.

The above considerations of *minimum internal liberalism* recall Kymlicka's skepticism of "internal restrictions." They are indeed the application of Kymlicka's skepticism of "internal restrictions" into a *theory of the Right to Democratic Belonging*.

Concluding Comments

There are four concluding comments. First, *the right to belong in a community of equals* includes the *right to* "free-identity" belonging. Therefore the latter is inherent in the former. Second, the *right to* "free-identity" belonging is theoretically based on two main theoretical premises: (i) the acceptance that every person is unique, autonomous and of equal worth, and (ii) the relational feature of human life. Therefore, the two first concluding remarks relate to the nature of the right and its theoretical foundation.

The third concluding comment is that the *right to* "free-identity" belonging can have different forms of more specific *identity group differentiated claims* and/or *rights*. The term of *identity group differentiated rights* recalls Kymlicka's term of "group differentiated rights." It, however, emphasizes explicitly that these claims or rights are related to identity. This specific explicit reference to identity has proved useful to distinguish this discussion with other group differentiated rights which, even if they may involve identity issues, are based primarily on a more universal ground of social justice and amelioration of other types of disadvantage, which may not relate primarily to identity. I have focused on examples of identity issues relating to ethnic origin, race, and language. Thus, the third concluding remark relates to the forms of the right while focusing on the search for more specific, tangible forms of the right.

The fourth concluding comment relates again to the forms of the right, with focus on the identification and analysis of these specific forms of the right. The concluding remark is that there are, at least, four forms of *identity group differentiated rights*: (i) promoting immersion and integration; (ii) claims or rights for amelioration of a disadvantage rooted in history and integration; (iii) preventing assimilation and promoting integration; (iv) claims or rights for exclusion from laws and regulation, but not in the form of self-government rights, and (v) self-government rights.

The fifth concluding comment focuses on identifying related legal tools for implementing the theory; yet it is not an implementation of the theory but a model of analysis for the implementation of the theory. Following the above analysis of the theoretical foundations of the right and the more specific forms of the *right to* "free-identity" belonging, I have identified four criteria for the theory of the *identity group differentiated rights* or *claims*. I haven't specified how these claims can be involved in the analysis each time. Therefore, my

discussion so far has been about general criteria for assessment of these claims. These criteria are still general criteria, as we haven't yet discussed specific cases, specifying who the claimant is in each claim and what exactly is invoked by each claimant. These specifications will be made mainly when the theory is applied in a certain case. The general criteria identified for the theory are suggested to be elements which can coexist even in the same *identity group differentiated right* or *claim*. However, in other instances, all these criteria may not be applicable to the certain group identity differentiated claim or right under analysis. For now, the four general criteria, in order to assess the involved *identity group differentiated rights* or *claims* are the following:

i How much does the *identity group differentiated claim* and/or *right* express the personal uniqueness and autonomy of the beneficiaries?
ii How much is the *identity group differentiated claim* and/or *right* representative of the interests of the beneficiaries? An equality argument based on a two-fold trust criterion has been identified for assisting legal analysis. I have understood the relationship of trust between the representative and represented as being based on a virtual *Power of Attorney*. The first aspect of the criterion is based on the trust that there is no conflict of interest between the *Trustee/Representative* and *Trustor/Represented*. The second aspect of the criterion is based on the trust that the *Representative/Trustee* knows and understands the real interests of the *Trustor/Represented*. It is only under these conditions of trust that the *Trustor* will be the *Beneficiary* of the virtual *Power of Attorney* between the *Trustee/Representative* and *Trustor/Represented*.
iii How remedial is the *identity group differentiated claim* and/or *right* to the needs of beneficiaries?
iv How much does *the identity group differentiated claim* and/or *right* respect the *minimum internal liberalism*?

Therefore, it is concluded that it is possible that some general criteria can guide judicial review analysis and policy making over the *identity group differentiated rights or claims*. It is not that it is suggested that the suggested criteria are exhaustive. It is suggested that they contribute as contextual factors, points of references for structuring the legal analysis and substantive criteria for this analysis of the *right to* "free-identity" belonging *in a community of equals*. As I have already clarified, what I suggest in this thesis is a model of analysis and not the complete analysis itself. This analysis should become more concrete when the judge and the policymaker take into account the particular facts of the particular claim. The required legal assessment is concrete and it should be based on the particular facts of each claim, calling the judge and policymaker, each in her/his constitutional power, to identify and check whether the specific criteria of the theory are met in each claim.

Some of the terms used in this Chapter need complementary explanations. These are *minimum internal liberalism* and *representativeness*. I have discussed

representativeness in Chapter 2 and the reader needs to bear in mind all these explanations each time I refer to this term. What is still missing from my suggestion for the judge and policymaker to be able to figure out how to approach each specific claim of belonging is to discuss and clarify the significance of the specific grounds upon the distinction (*e.g.*, gender, race, ethnic origin, *etc.*) in the context of the specific claims and specific claimants. This will be the purpose of Chapter 6. What is also missing is how the judge and policymaker can assess the reasonable limits of the *Right to Equal Belonging in a Democratic Society*. As this refers to a model of analysis of general theory which can be applicable at any time that a right is restricted in a democratic society remains outside of the specific scope of this book, which deals with the definition of the scope of the *Right to Democratic Belonging* and a model of analysis of this right.

But, we are still missing one main part of the definition of the scope of the *right to equal belonging* in a democratic society, that is, the *right to belong in a community as equals* or, in other words, the right to equal belonging. The latter is a more general inherent right in the ultimate right of the *Right to Democratic* Belonging. Both the two previous chapters have presented two more specific inherent rights in this more general inherent right in the ultimate right of the *Right to Democratic* Belonging. Similarly, the next chapter presents a third more specific inherent right in the more general *right to equal belonging*: the *right to a minimum comfortable belonging in a community of equals*. The purpose of the next chapter is to present a model of analysis of this third specific inherent right.

5 The Right to a Minimum Comfortable Belonging in a Community of Equals

Introduction

To feel comfortable in a relationship is a result of having a security and freedom in your relationship. This is exactly how it works for our social connectedness and membership in a certain society. Being a member of a particular society is composed of a myriad of social relationships. Being a member of any classroom in an educational institution is also composed of a myriad of social relationships. Learning is inherently relational and social. One could say that the explicit reference to the *right to comfortable belonging* could therefore be omitted from the explicit features of equal belonging. The *right to minimum comfortable belonging in a community of equals* is indeed a by-product of *the rights to secure and* "free-identity" belonging, developed in the two previous chapters. It may be that the comfort one feels in a relationship is a matter of the degree of security/safety and freedom one has in this relationship.

However, the explicit reference and identification of the *right to minimum comfortable belonging* is necessary, since it emphasizes a situation of lack of anxiety, resulting from the enjoyment of the *rights to secure and* "free-identity" belonging. It refers specifically to the situation of anxiety in the case of a violation of, at least, one of these two other inherent rights. It is a *minimum* right, because it prohibits only the discomfort related to the threat or violation of the two other inherent rights. It does not refer to any general lack of discomfort and anxiety. Section I names this additional inherent right and criterion to define and review the *right to equal belonging*: the *right to a minimum comfortable belonging in a community of equals*, as a by product of the secure and "free-identity" belonging. It is thus the third inherent right in the more general *right to belong in a community of equals*. The *right to minimum comfortable belonging in a community of equals* refers to certain "feelings of insecurity," which includes, let's name it, identity anxiety.

Sections II and III go to the heart of *the right to a minimum comfortable belonging in a community of equals*. They discuss the anxiety caused both to the vulnerable target and the potential or suspected trespasser. Both sections present the anatomy of the anxious relationships resulting from the wrong type of belonging, which is not secure, safe and free in terms of identity (hereinafter

"the wrong," except if otherwise is specified). The above concerns represent two main analytical pillars which are specific to the review of the *right to minimum comfortable belonging*: (I) the pillar of anxiety of the vulnerable target, and (II) the pillar of anxiety of the potential or suspected trespasser. In the pillar of vulnerability, I distinguish "the anxiety of the wrong" from "the anxiety of the threat of the wrong." Timing also plays a significant role in the feelings of anxiety. Therefore, within the pillar of vulnerability I have identified two analytical sub pillars: (i) the pillar of anxiety during and after the wrong, and (ii) the pillar of anxiety during and after the threat of the wrong (before the wrong itself is realized).

Let's see the three Sections in turn.

I. The By-product Right of the Secure and "Free-Identity" Belonging in a Community of Equals

The *right to a minimum comfortable belonging in a community of equals* is the by-product of the *rights to secure and* "free-identity" belonging *in a community of equals*. The kind of comfort I am talking about is a by-product of the secure and identity free belonging in a community of equals. In such a community, the fates of security, freedom and comfort are intertwined, as they love each other. They are all constituent parts of the *right to equal belonging*. In this Section, I will explain the interconnection of secure and "free-identity" belonging with the minimum comfortable belonging. I will also provide some general introductory remarks for the meaning of the minimum comfortable belonging.

To feel comfortable in a relationship is, firstly, the result of having a secure and trustworthy relationship. You can then live in the relationship without anxiety and plan for your relationship. It is only then that you can have dreams for this relationship because you see a long-term prospect. Security and trust in a relationship presuppose each other. Secure belonging in a public relationship requires trust among the members of the relationship. To feel secure in a relationship means that you trust the person/s who are part of the relationship. It means that you trust that the other members of the relationship will treat you well and will take care of your personal interests. But to achieve the sense of trust, we need to give a sense of security. To build trust is an ongoing process of working on the relationships between the members of the relationship and an ongoing assessment of the real and full context of this relationship. One cannot just claim to enjoying trust of the other person. One can only be awarded with trust after an ongoing and sincere effort. Providing security is a part of the process of building trust. At the same time, working on trust is a part of the process of building security. To build trust, is however, particularly difficult when the past experiences of the people involved include division and traumatized memories. To fight distrust and conflict takes a theory, action, forgiveness, time and sincere effort.

The question then is "what kind of treatment can provide the members of the relationship with security and trust?" What is this kind of treatment that

one should expect in a relationship to feel secure in it? What is this kind of treatment that one should expect in a public relationship to feel a minimum trust in it? What then is this treatment, which can provide a secure belonging and at the same time trust in the relationship, if the past includes division and conflict?

Following the analysis of the *right to secure belonging in a community of equals* in Chapter 3, with regards to a public relationship, these minimum conditions are the absence of, at least, the following wrongs: prejudice, negative stereotype, perpetuation and/or worsening of a pre-existing disadvantage and a systemic political disadvantage or, as the systemic political disadvantage has been termed in Chapter 3, an institutionalized political disadvantage. Each of these four elements results in a kind of a minimum comfortable belonging. First, the absence of prejudice results in a trusting environment of prejudice free relationships. Consequently, the absence of prejudice generates a comfort of not having to deal with the wrong, threat or suspicion of the wrong of prejudice. Second, the absence of stereotype results in a trusting environment for stereotype free relationships. Consequently, the absence of stereotype generates a comfort of not having to deal with the wrong, threat or suspicion of the wrong of stereotype. Consequently, the absence of the perpetuation and/or worsening of any pre-existing disadvantage, which may lead to a risk of domination results in a trusting environment of non dominance relationships. The absence of perpetuation and/or worsening of such disadvantage generates a comfort of not having to deal with the wrong, threat or suspicion of the wrong of dominance. Third, the absence of systemic political disadvantage results in a trusting environment for non dominance in political relationships. Consequently, the absence of a systemic political disadvantage generates a comfort of not having to deal with the wrong, threat or suspicion of the wrong of dominance and tyranny of the majority in the political system. Therefore, secure belonging provides the minimum comfortable belonging in the sense of having trust for relationships free from prejudice, stereotype, dominance and, in other ways, tyranny. In other words, the violation of the *right to secure belonging in a community of equals* is a violation of the *right to minimum comfortable belonging in a community of equals.*

In the same vein, following the analysis of the *right to* "free-identity" belonging, with respect to a public relationship, the *right to* "free-identity" belonging provides the comfort of "free-identity" relationships. You are free to be true to yourself, at least in the following sense: you can be respected in your identity and be immersed in a society, learning the dominant language, be integrated in the larger society, without being forced to be assimilated or be subjected to an identity-trespassing or trauma. You can, sometimes, even be excepted from regular laws and regulations, if otherwise you are found at a disadvantage regarding your identity which demeans your equal belonging to the society. Some times, you can even have self-government rights. You can thus claim to belong to a certain society in your own way, if this provides identity free belonging. It is another issue whether reasonable limits in a

democratic society may restrict this freedom.[1] Therefore, to feel comfortable is a result of being free within the relationship. Being accepted with your uniqueness frees you from identity anxiety. You have been accepted and appreciated as you are and all you have to do is to make your best unique contribution to the relationship. Identity free belonging provides a respective kind of comfort; an identity minimum comfort in a community of equals.

Therefore, the minimum comfortable belonging is a minimum lack of anxiety in our social connectedness for relationships free from prejudice, stereotype, non dominance and forced identity assimilation. Put in positive terms, it is the minimum trust in our social connectedness for relationships free from prejudice, stereotype, non dominance and forced assimilation. Therefore, what I mean by comfortable belonging is first the lack of anxiety, stress, worry or fear about your secure and "free-identity" belonging in a community of equals. While the previous two chapters were dealing with two kinds of wrongs, the wrongs of a belonging which is not safe and identity free, this chapter deals with the emotional discomfort as a result of the wrong or threat or suspicion of the wrong. It deals with the emotional aspect of "the right to equal protection of the laws in a democratic society" or in other words, *the Right to Democratic Belonging*. Therefore, there are three elements which are parts of the required comfort for the right to *minimum comfortable belonging in a community of equals* to be protected. They can be presented in three pairs of synonyms: (i) comfort or trust; (ii) in belonging or social connectedness/membership; (iii) at a minimum threshold or at least at the threshold of the absence of prejudice, stereotype, non dominance and identity freedom.

The respective discomfort in the case of violation of the *right to minimum comfortable belonging in a community of equals* can be seen in two main pillars; (a) the pillar of anxiety of the vulnerable target, and (b) the pillar of the anxiety of the potential or suspected trespasser. The first pillar presents the emotional side of harm from the relationships of distrust that some people will violate your secure and "*identity-free*" belonging. The second pillar presents the anxiety that you may or will violate *the rights to secure and* "free-identity" belonging of other people. Both pillars invoke the anxiety of one participant of the relationship that at least one other participant in this relationship may confirm a negative stereotype against him/herself. The factor of anxiety is thus an additional tool for the judge and policymaker reviewing the *right to equal belonging*.

The two pillars of anxiety are suggested as analytical tools in the theory of the *right to minimum comfortable belonging in a community of equals*. Not that I will analyze these criteria fully. However I identify them and I initiate a

1 This issue is analyzed partially in Chapter 7. The *minimum content of the Right to Equal Belonging in a Democratic Society* I analyze in Chapter 7 is one of the crucial notions in the question of whether the limits of the right can be justified in a democratic society. The theoretical background of what is a democratic society, analyzed in Chapter 2, is also crucial for the justification of the limits of the rights in a democratic society.

discussion about them. I therefore suggest, as I have already clarified, a model for the analysis without providing a comprehensive and exhaustive study on the issue.

II. The Pillar of the Vulnerable Target

i. The Sub-Pillar of Anxiety During and After the Wrong

Psychologists emphasize the role of emotions in intergroup contact. In particular, they discuss feelings of insecurity like stress and anxiety because of prejudice. As Thomas F. Pettigrew and Linda R. Tropp say, "[e]motions such as anxiety and threat are especially important negative factors in the link between contact and prejudice."[2] The Perception Institute, a consortium of leading social scientists engaged in the mind sciences[3] in the United States, has recently published the first volume of the *Science of Equality, Addressing the Impact of Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Health.* This report, is based on over two hundred studies[4] and it defines racial anxiety as "discomfort about the experience and potential consequences of interracial interaction."[5] As they summarize, "[p]eople of color can be anxious that they will be the target of discrimination and hostile or distant treatment."[6] They also go on to explain:

> [p]eople experiencing racial anxiety often engage in less eye contact, have shorter interactions, and generally seem – and feel – awkward. Not surprisingly, if two people are both anxious that an interaction will be negative, it often is. So racial anxiety can result in a negative feedback loop in which each party's fears appear to be confirmed by the behavior of the other.[7]

Through the above report, leading scholars translate the current research on implicit bias, racial anxiety and stereotype threat to make this evidence more accessible to non-experts. I find their report to be an extremely useful tool for the legal analysis of the *Right to Democratic Belonging*.

Furthermore, even more recently, Allison S. Elgart, Victoria C. Plaut, Nicole Arlette Hirch, and Eva Jefferson Patterson confirm the above evidence in their

2 Thomas F. Pettigrew and Linda R. Tropp, "Allport's Intergroup Contact Hypothesis: Its History and Influence", *in On the Nature of Prejudice. Fifty Years after Allport* 263 (ed. John F. Dovidio et al. 2005), at 269 (quoting Blair, Park, and Bachelor, 2003; Stephan et al., 2002; Stephan and Stephan, 1992; Voci and Hewstone, 2003; see also Stephan and Stephan's ch. 26 in the same volume).

3 Rachel D. Godsil et al., *Science of Equality*, Vol 1, *Addressing the Impact of Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Health* 3 (2014).

4 *Id.* at 4.

5 *Id.* at 10.

6 *Id.*

7 *Id.*

review. As they report: "[s]ocial science research shows that initial interactions with members from identity groups different from one's own (i.e., individuals from different racial, socioeconomic, or gender groups) can stimulate anxiety and distress."[8] As they further more: "[t]his initial anxiety manifests physiologically in cardiovascular reactivity, increased production of cortisol (commonly called the 'stress hormone'), and changes in the regularity of heart rate per breathing cycle."[9] Therefore, the insights by Elgart and her colleagues can inform the nature and extent of the harm stem from anxiety and stress.

Major and Vick, discussing Allport's chapter on the psychological impact of prejudice, point in the same direction. They report that Allport was talking about the "deep feelings of anxiety" one can have as a result of being the chronic target of prejudice. As they report: "Allport postulated that chronic targets of prejudice are haunted by feelings of anxiety over whether they will suffer insult and humiliation at the hands of the nonstigmatised and as a consequence, experience deep feelings of insecurity."[10] Therefore, psychologists have been working on understanding the harm of the "deep feelings of insecurity" and identity anxiety.

Other psychologists write on the nature of the harm of the anxiety, but my purpose is not an exhaustive review of their literature.[11] Instead, I hope to provide the judiciary with a methodological tool for the review of the *right to a minimum comfortable belonging*. This has been "the pillar of anxiety during and after the wrong." My purpose is also to indicate insights from experts about the nature of such harm during and after the time of the violation of *the rights to secure and* "free-identity" belonging. At the same time, I indicate my

8 Allison S. Elgart, Victoria C. Plaut, Nicole Arlette Hirch, and Eva Jefferson Patterson, "The Promise of Diversity in Remedying the Harms of Identity-Related Threats and Racial Isolation," *in Affirmative Action and Racial Equity. Considering the Fisher Case to Forge the Path 46 (Uma M. Jayakuma and Liliana M.Garces with Frank Fernandez, eds. 2015) (quoting* e.g., *Blascovich, Mendes, Hunter, Licker, & Kowai-Bell, 2001 as indicating evidence)*.

9 *Id.* (quoting Blascovitch, Mendes et al., 2001; Page-Gould et al., 2010).

10 Brenda Major and S. Brooke Vick, "The Psychological Impact of Prejudice", *in On the Nature of Prejudice: Fifty Years after Allport* 143 (ed. John F. Dovidio et al., 2005). As they go on to report: "[h]e wrote, "Alertness is the first step the ego takes for self-defense. It must be on guard. Sometimes the sensitiveness develops to an unreal pitch of suspicion; even the smallest cues may be loaded with feeling" (Allport, 1954/1979, at 144–5). In response to these feelings of insecurity, he proposed that the stigmatized become alert for and sensitive to signs of prejudice in others and preoccupied with the possibility that they are or will become a target of prejudice. Further, he proposed that in some cases this preoccupation becomes excessive, leading to vigilance, hypersensitiveness, and deep distrust of all members of the dominant group. He labeled this response obsessive concern.

It seems that we can assume that this is a harm that is caused to people who have been exposed to a chronic violation or a threat of violation of their equal belonging.

11 *See, e.g.*, Godsil et al., *above* note 3, at 65–75 (listing in the References the literature on racial anxiety (65–70) and racial anxiety interventions (70–75)).

respective lack of expertise in an issue which does not fall solely within "law", first to replace the experts' insights and then to analyze their insights without their guidance. My effort in this subsection turns out to be a call to a judge to be consulted by experts if the claimant alleges an emotional harm from the wrong of prejudice, stereotype, dominance or forced assimilation and/or identity disrespect. Furthermore, my effort in this subsection is a call to the policymaker to be consulted by the experts and to take into account the emotional harm from the wrong of prejudice, stereotype, dominance or forced assimilation and/or identity disrespect. My purpose is thus to create some discomfort and insecurity to both the judge and the policymaker who disregard the element of the minimum anxiety in the analysis of "the *right to equal protection of the laws*" and the respective reports by the experts.

ii. The Sub-pillar of Anxiety During and After the Threat of the Wrong

For two decades psychologists have dealt with the theory of stereotype threat. The theory of stereotype threat was initiated by Steele and Aronson in 1995. In their paper "Stereotype Threat and the Intellectual Test Performance of African Americans"[12] they presented their hypothesis and findings. Godsil et al state "[s]tereotype threat is most often examined as the fear of confirming a stereotype that one's group is less able than other groups to perform a valued activity"[13] and discussing Steele and Aronson's findings they claim: "[t]his basic research finding has been replicated in hundreds of studies."[14] They emphasize thus, that "[w]hen people are aware of a negative stereotype about their group, their attention is split between the test at hand and worries about being seen stereotypically."[15]

Steele and Aronson's hypothesis was that people acting under conditions of threat to be stereotyped are affected negatively in their performance.[16] Their first experiment was among African-American and white college students. These two groups took the same difficult test both under conditions of stereotype threat and under conditions of non stereotype threat. The test was "a

12 Claude M. Steele and Joshua Aronson, "Stereotype Threat and the Intellectual Test Performance of African Americans," 69 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 797 (1995).

13 Godsil et al., *above* note 3, at 31. *See also, e.g., Stereotype Threat: Theory, Process and Applicaation* (Michael Inzlicht and Toni Schmader eds. 2012) for similar definitions of stereotype threat.

14 Godsil et al., *above* note 3, at 32 (quoting Brown and Day, 2006).

15 *Id.* at 31–32.

16 http://www.reducingstereotypethreat.org/bibliography_steele_aronson.html for a review of the paper. As has been described," [t]his paper raised the possibility that culturally-shared stereotypes suggesting poor performance of certain groups can, when made salient in a context involving the stereotype, disrupt performance of an individual who identifies with that group. This effect was termed stereotype threat, and the existence and consequences of stereotype threat were investigated in four experiments." *See also, e.g.*, Godsil et al. *above* note 3, at 31–32 (reviewing the paper).

difficult test using items from the GRE Verbal exam."[17] The finding was the following: "African-American participants performed less well than their white counterparts in the stereotype threat condition." Instead, African-American participants in the non-threat condition had "an equal performance with their white counterparts."[18] As it has been described, "Experiment 2 provided a replication of this effect but also showed that African-Americans both completed fewer test items and had less success in correctly answering items under stereotype threat." Therefore, under conditions of stereotype threat, African-American students were less successful than in free from stereotype threat conditions.

In Experiment 3, the two groups completed two tasks. The first was described as assessing intellectual ability. The second task was not assessing such ability. The findings of the third experiment have been described as follows:

> [w]hen the task supposedly measured ability, African-American participants performed more poorly. In addition, they showed heightened awareness of their racial identity (by completing word fragments related to their ethnicity), more doubts about their ability (by completing word fragments related to low ability), a greater likelihood to invoke a priori excuses for poor performance (i.e., self-handicapping), a tendency to avoid racial-stereotypic preferences, and a lower likelihood of reporting their race compared with students in the low-threat condition.

Therefore, under the assessment of their intellectual ability, African-American students were again less successful.

In Experiment 4, the purpose was "to identify the conditions sufficient to activate stereotype threat." The two groups of undergraduates completed the "non-threat conditions from Experiments 1 & 2"[19] and the scientists tried to identify the activating conditions.

The finding was the following:

> [u]nlike those experiments, however, students' racial ethnic information was solicited from half of the students, right before they completed the test items. Results showed that performance was poorer only among African-Americans whose racial identity was made salient prior to testing.[20]

17 In the stereotype threat condition, students were told that their performance on the test would be a good indicator of their underlying intellectual abilities. In the non-threat condition, they were told that the test was simply a problem solving exercise and was not diagnostic of ability.

18 http://www.reducingstereotypethreat.org/bibliography_steele_aronson.html

19 *Id.*

20 *Id.*

It was stated that "[t]hese studies established the existence of stereotype threat and provided evidence that stereotypes suggesting poor performance, when made salient in a context involving the stereotypical ability, can disrupt performance, produce doubt about one's abilities, and cause an individual to disidentify with one's ethnic group."[21]

The recent theory of stereotype threat has been linked to Allport's previous insights. In particular, Major and Vick, reviewing the literature fifty years after Allport, see a link between Allport's insights and the recent theory of stereotype threat. As some of the meta-analysts of Allport's findings summarize: "[i]n summary, rudiments of Allport's idea that targets of prejudice are anxious about and alert for signs of prejudice in others can be found in contemporary theory and research on stereotype threat and attributional ambiguity."[22] Significant elements of the theory of stereotype threat have been checked by psychologists for even longer than the two decades since Steele and Aronson's 1995 paper. One could perhaps argue that the theory of stereotype threat is linked to the findings of the "deep feelings of anxiety" as a result of being the chronic target of prejudice in Allport's sense.[23] However, the fact is that it is Steele and Aronson's 1995 paper and their finding that initiated a comprehensive theory of the stereotype threat.

Allison S. Elgart and others have also summarized the studies on Stereotype Threat and Physiological Stress Reactions.[24] They report:

> [e]xperiencing stereotype threat can result in physiological change in the body and brain, thus undermining academic performance expectations, increasing feelings of self-doubt, and generally reducing an individual's cognitive resources precisely when they are needed most (see Schmader, Forbes, Zhang, & Mendes, 2009; see also Schmader, Johns, and Forbes, 2008). Students who experience stereotype threat endure elevated levels of anxiety manifested in their cardiac functioning during outcome-oriented tasks, such as taking an exam. This strain results in the physiological production of cortisol, which greatly increases when one "fears being negatively evaluated during a task" (Schmader et al., 2008, p. 343). In large quantities cortisol impairs the process of memory stores, such as "working

21 *Id.*

22 Major and Vick, *above* note 10, at 145. They go on to say, "[h]is belief that targets of prejudice become obsessively concerned with and hypersensitive to prejudice has received less support. Evidence of individual differences in chronic concerns about being a target of prejudice, however, suggests that some individuals may display the "obsessive concern" and vigilance that Allport described. Whether these individuals are 'hypersensitive' to prejudice, or merely 'accurate' perceivers of prejudice, however, is difficult to disentangle."

23 I find myself that one may argue this, if one accepts Major and Vick's review of Allport's work, *above* note 10, at 139, 143 (reviewing Allport's work and reporting his insight for "feelings of anxiety" and "deep feelings of insecurity").

24 Elgart et al., *above* note 8, at 51–52.

> memory" – the coordination of cognition and behavior to achieve performance goals in the presence of other competing information that can distract an individual's attention when focusing on a challenging task. Consequently, students may not have full access to their own internal cognitive processes during the very moments when they are being called upon to perform tasks that require high cognitive functioning (Schmader et al., 2008).
>
> Moreover, increased exposure to situations that trigger stereotype threat may lead to a greater number of experiences of elevated blood pressure. In a study by Blascovich, Spencer, Quinn, and Steele (2001), African Americans showed higher blood pressure reactivity while completing an academic test under stereotype threat as compared with European Americans or with African Americans who were not under stereotype threat. Although the link between these acute increases in blood pressure and chronic hypertension was not tested in this study, the findings raise questions about the long-term health effects of stereotype threat.[25]

As demonstrated, psychologists have reported detailed harm in the body and brain stems from the experience of stereotype threat.

Furthermore, psychologists show that the feelings of stress in stereotype threat situations result in a phenomenon called "stereotype threat spillover." Michael Inzlicht, Alexa M. Tullett, and Jennifer N. Gutsell present a working model of what they similarly term "stereotype spillover." Their purpose was "to extend the theory of stereotype threat, to include effects that may occur after people leave threatening environments, when stereotypes are no longer 'in the air'."[26] As they explain for the working model: "[t]his model asserts that targets of prejudice face social identity threat, which can result in involuntary stress reactions, like anxiety and cognitive distraction, and volitional coping responses, like trying to suppress stereotypes and emotions."[27] They have also identified short- and long-term harms:

> [i]n the short term, this stress means that individuals will spend their limited energies to cope, leaving them with less energy to do other things, including eating a balanced meal and making sound decisions. Over the long term, this increased stress can directly and indirectly lead to physical and mental health problems, such as subjective well being, anxiety, and the risk of certain cancers.[28]

25 *Id.*

26 Michael Inzlicht, Alexa M.Tullett, and Jennifer N. Gutsell, "Stereotype Threat Spillover: The Short and Long term Effects of Coping with Threats to Social Identity", *in Stereotype Threat, Theory, Process and Application* 117 (quoting Steele, 1997).

27 *Id.*

28 *Id.*

Again, as in the previous section, I could continue reviewing studies by psychologists and other experts of the nature of the harm of the anxiety from stereotype threat. My purpose is neither to contribute to the social sciences nor to exhaustively review the whole relevant social science literature.[29] My purpose has been to provide the judge and policymakers with an additional methodological tool for the review of *the right to a minimum comfortable belonging in a community of equals*, the pillar of anxiety of the target during and after the threat of bias. It is a threat of violation of *the rights to secure and* "free-identity" belonging *in a community of equals*. I have also presented indications of the nature of such harm, as has been reported by the experts. And as in the previous section, I indicate my lack of expertise as a lawyer for an exhaustive and authoritative say on the matter which does not fall solely within the field of "law". This sub-section, in analogy to the previous one, has been thus a call to the judge to be consulted by the experts, if the claimant alleges an emotional harm from stereotype threat. It is likewise a call to the policymaker to be consulted by the experts and take into account an emotional harm from stereotype threat. The exact way both the judge and policymaker should be consulted by the experts each time seems to be related also to the doctrine of the separation of powers.[30] My purpose has been thus to create discomfort for both the judges and policymakers, who may disregard the element of anxiety and reports by the experts about the harm a person can have during and after exposure to an environment threatening insecurity and oppression.

III. The Pillar of the Potential or Suspected Trespasser

A person who may be perceived a potential or suspected violator of the *rights to secure and/or* "free-identity" belonging *in a community of equals* can also have an emotional cost. Under conditions of uncomfortable belonging, the potential or suspected trespasser or wrongdoer is also harmed. Anxiety from the wrongs or the threat of the wrongs of prejudice, stereotype, dominance or identity harm and forced assimilation do not harm only the persons who are wronged or are threatened to be wronged. Such anxiety and discomfort poison the whole relationship, harming all the participants in the relationship. Likewise, the authors of the first scientific report on equality, explaining racial anxiety, find that "[w]hites can be anxious that they will be assumed to be racist and, therefore, will be met with distrust or hostility."[31]

Similarly, Anderson finds that anxiety from stereotype threat affects not only African-Americans in the United States but whites too,. She finds that whites can be anxious not to confirm the stereotype that they are racists. For

29 *See, e.g.*, Godsil et al., *above* note 3, at 75–79 (listing in the References the literature on stereotype threat (75–77) and stereotype threat interventions(77–79)).

30 A development of a general theory of the separation of the powers in a democratic society is clearly a related question to my book. However, I don't undertake the task to answer it in this book.

31 Godsil et al., *above* note 3, at 10.

Anderson, prejudicial discrimination is not the only kind of effective discrimination.[32] As she says,

> [s]egregation may make whites feel emotionally distant from blacks, awkward and uncomfortable around them. This can cause whites to treat blacks unfavorably. Whites committed to nondiscrimination may also be vulnerable to stereotype threat: anxious about appearing racist, they may avoid interracial interaction, or act stiffly and formally toward blacks. Such behavior confirms the stereotype they wanted to avoid, since such cool and distant conduct treats blacks less favorably than whites, closing blacks off from relations of affiliation, trust and loyalty that are critical to economic advancement.[33]

She calls this behavior discrimination anxious and she points out that anxiety is an important factor behind troubled interracial interaction.[34]

Furthermore, psychologists show that the antidote to the stereotype threat in the classroom is identity safe teaching practices, which benefits everyone in the classroom.[35] They observed the conditions, under which "all students make progress." It is "when teachers focus on positive classroom relationships, challenging learning opportunities, and cooperation instead of competition, to build on all students' knowledge, curiosity and energy."[36] Under these conditions, schools have been seen to become "places to learn and to belong" for every child. Psychologists, therefore, describe conditions under which positive and entrusting relationships can be built. These positive relationships are inherently reciprocal. In other words, such relationships describe, in the light of their dialectical nature, conditions to build positive feelings for all the participants in the relationship.

An interesting perspective on the effects of stereotype threat has been suggested by Jennifer A. Richeson and J. Nicole Shelton in their discussion of stereotype threat in interracial interactions. They suggest that the reaction to

32 Elizabeth Anderson, *The Imperative of Integration* 58 (2010).

33 *Id.*

34 *See also id.* at 182 (stating that, "[m]any whites worry that even noticing a persons's race in interracial contexts may be perceived by blacks as racist; hence they pretend not to notice race even when faced with tasks where doing so can improve good performance. Blacks perceive such 'color blindness' as disingenuous and absurd. Moreover, whites who strategically adopt a color blind stance manifest discomfort with blacks in other ways-they avoid eye contact and appear less friendly. This is a case of anxious racial discrimination, prompted by stereotype threat (white fear of confirming the stereotype of white racism) (3.5). While such conduct is not racist, it is racially stigmatizing: it treats blacks as alien. Blacks naturally respond with feelings of alienation in setting with racially anxious whites)."

35 Dorothy M. Steele and Becki Cohn-Vargas, *Identity Safe Classrooms: Places to Belong and Learn* 5 (2013).

36 *Id.*

stereotype threat may be positive or negative. In particular, their chapter adopts a stereotype threat perspective to examine dynamics of interracial interactions. They first review relevant literature suggesting that both white and racial minority individuals are likely to experience stereotype threat during interracial interactions. Shelton then focus on the threat of being perceived as stereotypical of one's racial/ethnic group as the primary trigger of such threat reactions.[37] In applying a social identity threat framework to understand cognitive and affective experiences during interracial interactions, they "discussed the role of prejudice concerns in shaping these experiences arguing that a stereotype threat framework explains the patterns of results found quite well."[38] In their suggestions to policymakers, they outline "the ways in which both stigmatized and non-stigmatised groups members' concern about the value of their social identities, – that is, their experiences of social identity threat – […] in interracial interactions." Their evidence shows that "[m]ore broadly speaking, the negative effective and cognitive outcomes that often stem from stereotype threat during interracial interactions may lead individuals to attempt to avoid them."[39]

As Richeson and Shelton conclude,

> [u]nlike research within the stereotype threat tradition, however, research on interracial interaction dynamics suggests that individuals' behavioral responses to identify threats can be either positive or negative. That is, research has found that both racial majority and minority individuals under threat can behave in ways that are more positive than their unthreatened counterparts and, as a result, create interactions with outgroup partners that are more positive than those created by individuals who were not so threatened.

Richeson and Shelton warn however not to over-interpret these positive behavioral and interpersonal outcomes. They note that even these positive outcomes seem to be coupled with negative intrapersonal (cognitive and affective) outcomes for the threatened participants themselves. Nevertheless, they believe that the examination of interracial contact through the lens of stereotype threat is likely to be useful. They find that "[g]iven the compelling evidence that perceived threats to one's social identity are a primary source of intergroup hostility, it is important to develop a clear understanding of how

37 Jennifer A. Richeson and J. Nicole Shelton, "Stereotype Threat in Interracial Interactions," *in Stereotype Threat: Theory, Process and Application* 231, abstract (Michael Inzlicht and Toni Schmader eds. 2012).

38 *Id.* at 242.

39 *Id.* at 241, the policy box. As they go on to say:"[g]iven the documented positive effects of intergroup contact on racial attitudes, this possibility is particularly troubling. Hence, policymakers need to be cognizant of the role of individuals' social identity concerns as they seek to develop programs and interventions aimed at fostering more positive interracial encounters." *Id.*

interracial interactions may engender identity threat, and, more importantly, how to foster interactions that result in positive experiences for both individuals."[40]

I can offer at least one argument why the finding that the reaction to stereotype threat of the suspected violator is positive should be dealt with caution. The finding may mean that the potential or suspected trespasser will try to avoid trespassing. However, this finding does not suggest how much the effect of the stress stems from the stereotype threat on potential victims and in general on the relationship and its quality. The finding does not speak to the pragmatic effect of the effort to break the stereotype on the trust, satisfaction, efficiency and happiness of all the participants during the interaction of a mere social contact and/or an activity *e.g.*, learning. The finding does not mean that the potential victim does not go through a process, which is, if not traumatic, likely distracting from concentrating on achieving the primary purpose of the certain interaction and/or activity *e.g.*, learning.

Furthermore, if the potential victim tries to avoid the stereotype they face a double-edged sword since the effort to break the stereotype itself constitutes inequality. Any effort should come from inside as an autonomous decision and not as a coerced effort to break a stereotype and achieve equal belonging. Richeson and Shelton's finding does not say anything about trust, satisfaction and happiness during the interaction, even if a greater and more effective effort is made. Therefore, their finding does not say much about the effects of this stress on the real interpersonal and intrapersonal emotional situations during the interaction and/or activity. Even if one accepts their findings as correct, one will need a more elaborated analysis and additional findings to be enabled to balance the harm and the good from this greater effort stemming from stereotype threat. It is possible that some discomfort may hopefully lead to positive relationships. Future analysis must explore what kind of discomfort can be positive; the results of balancing the harm and the good of this discomfort, if any; whether it is possible to assess the latter; and whether the nature and impact of this effort is different for the vulnerable target from the ones on the potential or suspected trespasser.

In sum, anxiety can harm also the person who can be perceived as a potential wrongdoer of prejudice, stereotype, dominance and/or identity oppression.

Concluding Comment

The first concluding comment of this chapter is that the *right to minimum comfortable belonging in a community of equals* is a by-product of *the rights to secure and/or* "free-identity" belonging *in a community of equals.* Three more specific rights are suggested as inherent rights in and analytical criteria for the definition of the more general *right to equal belonging.* This is the broad scope of *the Right to Democratic Belonging.*

40 *Id.* at 242–243, the conclusion.

I have indicated that the wrong or the threat of the wrongs of the violation of the *right to secure belonging in a community of equals* and/or the *right to* "free-identity" belonging *in a community of equals* result in discomfort. In particular, I have indicated that the emotional harm from prejudice, stereotype, dominance and forced assimilation and disrespect of identity can be seen in two main pillars of anxiety. The first is "the pillar of the vulnerable target" (Section I). I have also distinguished the sub-pillar of the "anxiety of the wrong" and "the anxiety of the threat of the wrong." The second pillar is "the pillar of the potential or suspected trespasser or wrongdoer." I could have made an analogous distinction between the sub-pillars of wrongdoing and of the threat of wrongdoing. While this book does not provide a comprehensive review of the psychology and social sciences literature, I do urge the judge, during the judicial review of "the right to equal protection of the laws" – understood here as *the Right to Democratic Belonging* – to find answers on these issues on such a level as to be able to judicially review the particular case. This exercise is particularly useful when the claimant refers to a harm of anxiety and discomfort. Similarly, the policymaker, during the legal analysis of "the right to equal protection of the laws" – understood here as *the Right to Democratic Belonging* – must take into account a harm of anxiety and discomfort when solving problems. I call on judges and policymakers to collaborate with experts in a common effort to protect *the Right to Democratic Belonging*, protecting from the harm of anxiety. This collaboration demands some deference to the experts. Depending on the context of the political separation of powers, the judge will either defer to the policymaker or experts as witnesses before the court and the policymaker will consult with experts in the process of policy making.

In this chapter, the input of social sciences has been unavoidable. Comfort and anxiety, trust and distrust are emotional situations. Thus, psychologists are the primary experts here. Drs. Kenneth and Mamie Clark's submission of evidence in *Brown* has been "perhaps the most famous example of the use of social science in judicial decision making."[41] The Court in *Brown* relied on their submitted evidence, while its decision was criticized for resting on psychological rather than legal grounds.[42] Minow, discussing the strengths and limits of social science research on social integration, including research launched in the wake of the *Brown* litigation, explains: "[t]he boost *Brown* gave to the field of social psychology to advance racial equality has some irony, given the reliance by defenders of racial segregation on eugenics and other 'scientific' theories of their day."[43] She emphasizes that "[c]ompetent social scientists could produce conflicting testimony,"[44] but also

41 Elgart et al., *above* note 8, at 43 (quoting Benjamin and Crouse, 2002).
42 *Id.*
43 Martha Minow, *In Brown's Wake: Legacies of America's Educational Landmark* 138–139 (2010).
44 *Id.* at 141 (providing as an example the psychiatric testimony about the sanity of particular criminal defendants).

a consensus.[45] As Minow reports, some in the United States were convinced of the benefits of desegregation by the social scientists[46] and others moved by the vision of integrated society.[47]

Certainly my suggestion is not a *carte blanche* use of social sciences in court. Instead, the use of social sciences in the courts when a particular case needs it requires great caution, as in any other case, where the judge needs to hear the experts. One cannot forget that the use of social sciences in Nazi Germany had helped to confirm the Nazi ideas. It has been written, "[r]acist ideas were taught in schools and penetrated in the fields of anthropology, sociology, history, biology and medicine."[48] Social scientists, like all the other kinds of researchers, can report findings which are not independent, but serve a certain agenda of ideology and interests.

However, often the judge needs to understand the most recent findings of an area of expertise, regardless of the field this issue primarily falls within. This will be the case, if the answers on an issue are presupposed to enable the judicial review of a certain claim. Furthermore, the level of controversy on a particular issue, in our case in the field of social sciences, the degree of consensus and how much future research is needed, as these are suggested by the experts themselves, are factors which can influence judicial review. It is with full consciousness that this is not an easy task for the judge, that I suggest this task. But whoever suggested that a judge has been assigned an easy task? An acknowledgement of this judicial task as more interdisciplinary and collaborative with primary experts on particular issues, which arise before the judge, can make the judge feel more comfortable, when she/he is required to decide upon the premise of a subject she/he does not primarily have from her/his legal training

As I have already said, one of my purposes in this chapter has been to generate discomfort for any judge or policymaker who disregards the reports of experts over anxiety, when anxiety is at stake during the judicial review or policy making over the *right to equal belonging*. I do not suggest that experts should have the final say. I suggest that when a subject falls within their expertise their research results cannot be ignored. In the case of controversial views and research the policymakers need to hear and examine the issue in depth. The judge should do this within the extent the separation of powers in a constitutional democracy permits in such a case. Experts may also have

45 *Id*. at 141–142 (providing as an example the Society for the Psychological Study of Social Issues report that was later reworked into a brief filed in Brown on behalf of prominent social scientists).

46 Martha Minow, "We're All For Equality in U.S. School Reforms: But What Does It Mean?," *in Just Schools* 26–27 (Martha Minow et al. eds., 2008) (appealing to studies which continue to stress the importance of integration in giving minority – group members access to social net works and economic mobility).

47 *Id*.

48 Note in the Holocaust Museum, Washington DC, under the heading of "The 'science' of Race" (viewed in 2014).

ideologies and agendas. Both policymakers and judges need to protect constitutional rights.

By now, the scope of *the right to equal belonging* or *the right to belong in a community of equals* has been defined through three inherent rights: (I) the *right to secure belonging in a community of equals* (Chapter 3); (II) the *right to* "free-identity" belonging *in a community of equals* (Chapter 4), and (III) the *right to minimum comfortable belonging*, as a by-product of the two previous rights (Chapter 5). We still need a theory about the *grounds of unequal belonging*. Depending on the legal analysis on the grounds of the distinction, both the judge and the policymaker may reach different outcomes. Chapter 6 explains the *grounds of unequal belonging* and their function within the *Theory of the Right to Democratic Belonging*.

6 Grounds of Unequal Belonging

Introduction

Equality guarantees in constitutions, international or transnational treaties, or social contracts, enumerate prohibited grounds of discrimination. Many times this enumeration is not exhaustive, but it can be extended with analogous grounds of discrimination. I suggest that these grounds in the equality guarantees, or antidiscrimination provisions, should be seen as contextual factors which must indicate experiences of unequal belonging in a democratic society. Consequently, depending on the context, these grounds are potential indicators of vulnerability and disadvantage of unequal belonging. In this case, the grounds trigger suspicions or are alerting for establishing a prima facie violation of *the Right to Democratic Belonging*. In other words, rather than providing an exclusive and specific list of wrongs, such grounds trigger suspicions for a violation of the *rights to secure and/or "free-identity" and/or minimum comfortable belonging in a community of equals*. These grounds are *grounds of unequal belonging*, and consequently, relevant to the analysis of the *right to the equal belonging*. I will argue therefore that the *grounds of unequal belonging* are contextual factors which potentially indicate experiences of vulnerability and disadvantage of unequal belonging. This is the essence of my argument in the following Section I and the premise upon the reader can follow the discussion in Section II.

This chapter is composed of two Sections. In Section I, I explain the above argument, dividing the analysis for reasons of clarity into two parts. I first clarify the forms of the grounds. Second, I explain the function of these grounds. Here, the reader will see a two-fold argument. First, I contend that the relevant grounds are contextual factors, which are potential indicators of unequal belonging. Second, and as a consequence, these grounds contribute to the analysis of *the right to equal belonging* with an alerting function towards the establishment of a prima facie violation of *the Right to Democratic Belonging*. In two stages I explain the function of *the grounds of unequal belonging* in the suggested judicial analysis of the right. First, this function has been explained as a component of the admissibility of the claim; how the grounds of unequal belonging contribute to whether a certain claimant has a claim which is

admissible in court. Then, the function is explained as the first level of the substantive analysis of the scope of the right to democratic belonging. I will, therefore, at this point, present the order of the analytical stages of the suggested judicial review theory and explain these stages.

Following this argument, building on the function of the relevant grounds, Section II describes further consequences in the legal analysis of the *Right to Democratic Belonging*. I identify three consequences: (i) a singular, fixed and abstract grounds approach is rejected; (ii) a mirror-comparator approach is also rejected, and (iii) a distinction between *inter- and intra-group complaints of unequal belonging* is clarified. I explain them in turn.

I. Grounds as Indicators of Unequal Belonging

i. Forms of Grounds of Unequal Belonging

Equality guarantees in various human rights legal documents enumerate prohibited grounds of discrimination, which at times can be extended by analogy.[1] The grounds which are enumerated or identified by analogy can be based on one single criterion e.g. race or multiple criteria e.g. race and gender. In reality, more frequently if not always, the relevant criteria are multiple and not a single one criterion. Similarly, *grounds of unequal belonging* can be enumerated in a certain provision of equal belonging or be analogous to such prohibited

1 *E.g.*, Section 15(1) provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

See also, e.g., Article 26 of the International Convenant of Civil and Political Rights:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

See also, e.g., Article 14 of the European Convention of Human Rights (under the heading of "Prohibition of discrimination"):

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

See also, e.g., Article 28(1) and (2) of the Constitution of Cyprus:

1. All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby.

2. Every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political or other convictions, national or social descent, birth, color, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution.[]

criterion. The grounds of unequal belonging take into account all the multiple criteria involved in situations of unequal belonging.

Injustices based on race, gender, religion, national or ethnic origin can be considered as the "paradigm case[s]" of unequal belonging in a democratic national or international community.[2] Nazism, slavery in the United States, forced assimilation of Aboriginal people in the United States, Canada, New Zealand, Australia, residential schools for Natives, and their eviction from their lands will be always remembered as some of the most shameful injustices in human history. Race and/or color were the primary motivators of these injustices. And at times, religion and ethnic origin were interconnected, if not among the primary grounds, as a component of the injustice as well. Furthermore, the inclusion of gender in the anti-discrimination provisions has been seen as a sign of victory against generations of the subordination or women and other minority gender groups. Thus, race, gender, color, religion, national or ethnic origin are the most commonly enumerated grounds in anti-discrimination provisions.[3] Similarly, these are grounds which can be proved to be *grounds of unequal belonging* and are more often enumerated in legal documents. They are, in other words, potential grounds of unequal belonging.

Examples of already recognized analogous grounds of discrimination include disability, sexual orientation, marital status and citizenship. In particular, the Supreme Court of Canada has already recognized sexual orientation, marital status and citizenship as analogous grounds to the enumerated categories of section 15.[4] On the other hand, while disability and age are included in the enumerated grounds of section 15, they were not included in the Civil Rights Act 1964 of the United States.[5] However, more recently the legal protection of discrimination in the United States has been enhanced through further federal statutes to include some protection against discrimination based on disability and age too.[6] The question is then, what

2 *See, e.g.*, Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* , 25 (2014) (for similar thought stating that "[g]roup – based discrimination, such as race or sex discrimination, is not the only way to violate the fair context principle, but it is the paradigm case.").

3 *See, e.g.*, Section 15(1); Article 26 of the International Convenant of Civil and Political Rights; Article 14 of the European Convention of Human Rights; Article 28(2) of the Constitution of Cyprus.

4 Withler v. Canada (Attorney General), 2011 SCC 12, para. 33, [2011] 1 S.C.R. 396 (reporting that "[g]rounds including sexual orientation, marital status, and citizenship have been recognized as analogous grounds of discrimination.").

5 Title VII of the Civil Rights Act of 1964 (7 Pub. L. 88–352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e (prohibiting employment discrimination based on race, color, religion, sex and national origin.) For further amendments see The Civil Rights Act of 1991 (Pub. L. 102–166) (CRA) and the Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111–2) which amend several sections of Title VII and Section 102 of the CRA. (available at https://www.eeoc.gov/laws/statutes/titlevii.cfm).

6 Section 102 of the CRA amends the Revised Statutes by adding a new section following section 1977 (42 U.S.C. 1981), to provide for the recovery of

do disability, sexual orientation, marital status, age and citizenship share that can make them analogous to race, gender and other commonly enumerated grounds? But first, let's address the issue of the multiple grounds of unequal belonging.

Grounds of unequal belonging can be a synthesis of various characteristics. Sometimes the legislature makes distinctions based on a synthesis of grounds. And even where the legislation makes a distinction based on a single criterion, e.g. race, the real impact of the legislation on the claimant may be reflected upon a synthesis of other grounds, e.g. race and gender. Ignoring this plural dimension of the disadvantageous impact and sticking to the single ground chosen by the legislature, one may ignore or hide discrimination. Such discrimination may exist among members of the same categorized group and internal minorities. Groups are not homogeneous and internal disadvantageous impacts may vary among the members of a group. The disadvantage experienced by people can be plural and the disadvantageous impact of legislation can be reflected by a pluralistic synthesis of various grounds. The relevant grounds are all the grounds which are involved in a certain experience and the real impact of this experience of unequal belonging. The relevant grounds of the real impact can be assessed only in context and they can be different among the members of wider society and/or within more specific identity groups.

Multiple grounds have been already recognized as analogous grounds of discrimination. In particular, the Supreme Court of Canada in *Law* considered that the combination of various involved grounds were analogous to the

compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973 (available at https://www.eeoc.gov/laws/statutes/cra-1991.cfm).

See also volume 42 of the United States Code, at sections 2000e-16a to 200e-16b, cited as the "Government Employee Rights Act of 1991" (having "the purpose to provide procedures to protect the rights of certain government employees, with respect to their public employment, to the freedom of discrimination on the basis of race, color, religion, sex, national origin, age, or disability" section 2000e-16a). *See also* section 2000e-16b (prohibiting discriminatory practices based on race, color, religion, sex, or national origin (para.1), but also age (para2) and disability (para.3)).

See also Martha Minow, *Making all the Difference: Exclusion, Inclusion and American Law* 116 (1990) (citing the opinion by Justice Marshall in City of Cleburne v. Cleburne Living Center, Inc 473 U.S. 432 (1985) who "analogizes the situation of mentally retarded persons with that of blacks and women, who have been similarly subjected to restrictive legal treatment because of faulty views held by those who make and enforce the rules.") Therefore, Justice Marshall seems to find an analogy of disability, gender and race on the basis of the disadvantage linked to the experiences of the members of these groups with these characteristics.

See also Patrick S. Shin, "Is there a Unitary Concept of Discrimination," *in* Philosophical Foundation of Discrimination Law 163, 177 (Deborah Hellman and Sophia Moreau, eds., 2013) (noting that "[d]isability is not one of the enumerated factors of Title VII, but is part of the legal definition of discrimination within the meanings of the Americans with Disabilities Act (ADA) of 1990.")

enumerated in section 15 grounds.[7] According to the Court, whether a "new" ground can be considered as "analogous" depends on the following factors: the purpose of the equality guarantee; the nature and the situation of the individual or group at issue; and the social, political and legal history of Canadian society's treatment of the group.[8] Therefore, the grounds of discrimination in the jurisprudence of section 15 can be enumerated or analogous, singular or multiple. So do *the grounds of unequal belonging*.

Many scholars have stressed the need to see the intersectionality of the grounds of discrimination. Among them, Sheppard understands the complexity of the identities and the need to apply intersectionality in the legal categories.[9] She observes that there is a tendency to isolate one aspect of a claimant's identity rather than acknowledge more complex and intersecting identities.[10] Gerapetritis, who has long been studying equality and affirmative action, suggests that "any generic affirmative action plan constitutes an over-simplistic approach to a rather complicated social phenomenon."[11] He sees "the wide differences between the members of a group,"[12] and he states that other "more objective and secure yardsticks, such as class or financial capacity, should apply,"[13] rather than "a more or less authoritarian criterion."[14] MacKinnon also argues about "[i]ntersectionality as [m]ethod."[15] She talks about experiences of "double discrimination"[16] and she calls for "capturing the synergistic relation between inequalities as grounded in the lived experience[.]"[17] One could wonder whether we need to suggest a reasoning of "grounds within grounds" to respond to internal inequalities.

7 Law v. Canada (Min. of Emp't. & Immigration), [1999] 1 S.C.R. 497, para. 93 (Can). As the Court states, "[w]here a party brings a discrimination claim on the basis of a newly postulated analogous ground, or on the basis of a combination of different grounds, this part of the discrimination inquiry must focus upon the issue of whether and why a ground or confluence of grounds is analogous to those listed in s. 15(1). This determination is made on the basis of a complete analysis of the purpose of s. 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group."

8 *Id.*

9 Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* 31–34 (2010).

10 *Id.* at 32 (citing references).

11 Georgios Gerapetritis, "Affirmative Action: A New Challenge for Equality," *in Values in Global Administrative Law* 263, 265 (Antony Gordon et al. eds., 2011).

12 *Id.*

13 *Id.*

14 *Id.*

15 *Generally* Catharine A. MacKinnon, "Intersectionality as Method: A Note," Journal of Women in Culture and Society, 38:4 (2013) 1019.

16 *Id.* at 1028 (quoting Crenshaw, 1989 and talking about experiences of discrimination of Black women).

17 *Id.*

Young, also argues, about the intersection of the relevant grounds, where she argues for "inclusive communicative relations in such flowing, decentered, mass politics."[18] She calls "for greater political inclusion in democratic processes argu[ing] for measures that encourage more representation of under-represented groups, especially when those groups are minorities or subject to structural inequalities."[19] She goes on to point out the false assumption of "[t]he unifying process required by group representation [which] tries to freeze fluid relations into a unified identity, which can re-create oppressive exclusions." As she says,

> [t]he idea of group representation, this objection claims, assumes that a group of women, or African Americans, or Maori, or Muslims, or Deaf people has some set of common attributes of interests which can be represented. But this is usually false. Differences of race and class cut across gender, differences of gender and ethnicity cut across religion, and so on. Members of a gender or racial group have life histories that make them very different people, with different interests and different ideological commitments. The unifying process required by group representation tries to freeze fluid relations into a unified identity, which can re-create oppressive exclusions.[20]

As Young also put it,

> [i]f there are different groups, they do not have clear borders but shade into one another and overlap. To be open to unassimilated otherness means not only acknowledging clear differences, but also affirming that persons have multiple memberships, and that some persons, either by choice or by accident, do not fit any characterization.[21]

Thus, *grounds of unequal belonging* can be enumerated, analogous, singular and/or multiple. But, the same questions arise again: what do these grounds share so as to make them fall within one conceptual legal category? And what is this conceptual legal category they all fall within?

ii. Function of Grounds of Unequal Belonging

The various *grounds of unequal belonging* share a two-fold function. First, they are potential indicators of unequal belonging. Second, and as a consequence of the first function, the *grounds of unequal belonging* have an alerting function

18 Iris Marion Young, *Inclusion and Democracy* 121 (2000).
19 *Id.* at 121–2.
20 *Id.* at 122. (citing references in her note 2).
21 *Id.* at 225.

during the analysis, triggering suspicions for a prima facie violation of *the right to equal belonging*.

My suggestion, combining these two functions, can be articulated as follows: the grounds of unequal belonging are contextual factors which potentially indicate experiences of vulnerability and disadvantage of unequal belonging. If this is the case, then, these grounds have an alerting function – triggering suspicions and indicating potential violation of the *right to equal belonging*. In other words, a distinction based on such grounds with such an alerting function establishes a suspicious adverse distinction to violate *the right to equal belonging*.

As far as the first function of the *grounds of unequal belonging* – as indicators of unequal belonging – the relevant grounds are only those that indicate experiences of vulnerability of unequal belonging. The same grounds of race, gender, ethnic origin, religion, marital status and sexual orientation can indicate experiences of vulnerability in one case, while they cannot do this in other cases. The relevant grounds are contextual factors to be examined as to whether they indicate experiences of vulnerability of unequal belonging. The question is whether these grounds in the particular case function as to indicate experiences of vulnerability and disadvantage of unequal belonging. Otherwise, the grounds themselves, without indicating such experiences of vulnerability of unequal belonging are not grounds of unequal belonging. In this case, the grounds cannot analytically contribute, adding suspicions toward the establishment of the prima facie violation of the *right to equal belonging*. The grounds of distinction can only fall within the *grounds of unequal belonging* when they illustrate experiences of unequal belonging.

I will now try to explain the first function of the *grounds of unequal belonging* more analytically in relation to the *right to equal belonging*. Their first function in the suggested theory is their function as indicators of vulnerability for experiences of unequal belonging. Following the analysis in the three previous chapters, the *grounds of unequal belonging* need to indicate such experiences of vulnerability and disadvantage as to contribute to the establishment of a prima facie violation of at least one of the inherent rights in the *right to equal belonging*; the *rights to secure and/or "free-identity" and/or minimum comfortable belonging in a community of equals*. First, as far as the *right to secure belonging*, the *grounds of unequal belonging* need to indicate, in the particular context of the particular case, experiences of vulnerability, which are in potential conflict with the *right to secure belonging in a community of equals*. In this case, the grounds indicate experiences of prejudice, stereotype, perpetuation or a worsening of a pre-existing disadvantage or other forms of [non-identity] oppression. Second, as far as the *right to* "free-identity" belonging *in a community of equals, the grounds of unequal belonging* indicate, in the particular context of the particular case, experiences of vulnerability which are in potential conflict with *the right to* "free-identity" belonging *in a community of equals*. In this case, the grounds indicate experiences of forced assimilation or other ways of identity oppression. In particular, these may be experiences that

come to conflict with "the rights or claims to immersion, integration, non assimilation, and even, sometimes, to exception from some rules and regulation and even self-government." Third, the *grounds of unequal belonging* need to indicate, in the particular context, experiences of vulnerability which are in potential conflict with *the right to minimum comfortable belonging in a community of equals*. In this case, the grounds indicate experiences of anxiety for an unsafe and insecure and/or "oppressed identity" belonging in the society. Grounds that do not indicate such experiences of vulnerability of unequal belonging or are not analogous to them are not *grounds of unequal belonging*.

The second function of the *grounds of unequal belonging* in relation to the *right to equal belonging* is their function as alerting signals during the analysis of the right. As we have seen, the relevant grounds are only those grounds that can trigger in a certain case suspicions for the prima facie violation of *the right to equal belonging*. If the grounds do not indicate the above experiences or analogous to them, they are not *grounds of unequal belonging* and they cannot trigger suspicions for the prima facie violation of the *right to equal belonging*. The same ground of race, gender, ethnic origin, religion, marital status, sexual orientation *etc*. can have an alerting function in one case and no or not the same alerting function in another case. Similarly to the explanations to their first function, the grounds of distinction should be understood as contextual factors and examined each time, whether, in the particular context of the particular case, they can contribute in the establishment in the prima facie violation of *the right to equal belonging*. Otherwise, the grounds of distinction themselves, without indicating such experiences of vulnerability, can not trigger suspicions for the prima facie violation of *the right to equal belonging*.

The second function of the *grounds of unequal belonging* is their alerting function during legal analysis, triggering suspicions for a prima facie violation of the *right to equal belonging*. To explain this second function more analytically and following the analysis in the three previous chapters of the three inherent rights in the *right to equal belonging*, the *grounds of unequal belonging* need to indicate such experiences of vulnerability and disadvantage as to contribute to the establishment of a prima facie violation of at least one of these three inherent rights: *the rights to secure and/or "free-identity" and/or minimum comfortable belonging in a community of equals*. As such, the *grounds of unequal belonging* trigger suspicions for a prima facie violation of *the right to equal belonging*.

The alerting function of *the grounds of unequal belonging* in each of the three inherent rights in *the right to equal belonging* is as follows: First, *the grounds of unequal belonging* may trigger suspicions for the prima facie violation of *the right to secure belonging in a community of equals*. In this case, the experiences indicated by *the grounds of unequal belonging* in the particular context illustrate a suspicion of prejudice, and/or stereotype, and/or perpetuation or worsening of a pre-existing disadvantage and/or other forms of oppression. Second, the grounds with the alerting function may indicate experiences which can trigger suspicions for the prima facie violation of *the*

right to "free-identity" belonging *of a community of equals*. In this case, the grounds should indicate such experiences of vulnerability, which trigger suspicion of forced assimilation or other way of identity oppression. Similarly to the explanations of the first function, these may be experiences that come to conflict with "the right or claims to immersion, integration, non assimilation, and even, sometimes, to exception from some rules and regulations and even to self-government." Third, the grounds with the alerting function may indicate experiences of disadvantage and vulnerability, which trigger suspicions for a prima facie violation of *the right to minimum comfortable belonging in a community of equals*. In this case, the grounds are contextual factors which trigger suspicions for anxiety for a belonging which is neither secure nor safe in a society, which does not protect the identity freedom of all the members. Grounds without such alerting functions cannot contribute in the analysis of *the right to equal belonging*.

The above suggestion finds support in the jurisprudence of the Supreme Court of Canada about section 15. In particular, the first stage of the judicial analysis is, as the Court said, "the establishment of the adverse distinction based on enumerated or analogous grounds." As the Court in *Withler* explains,

> [t]he first step in the s. 15(1) analysis ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*. In *Andrews*, it was held that s. 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them.[22]

It is important that the Court refers to the grounds connecting the person who brings the claim, that is the claimant, to the prohibited distinctions by the Charter. It is substantive discrimination/discriminatory inequalities which are prohibited under the Charter; not all the substantive inequalities and not all the distinctions. It is to the establishment of these "discriminatory inequalities" that the grounds should contribute, if they are going to be relevant in the discrimination analysis.[23] Therefore, in light of the contextual analysis of the Charter, these distinctions have to be in some specific conflict with the purpose of equality. Only then, can the suspicious grounds be considered discriminatory. Thus, the grounds which are relevant to section 15(1) are those which contribute to the analysis of the substantive inequality in general and the discrimination more specifically. This means, *a contrario* that, if the grounds of distinction don't present this function in the certain case, they can not serve the substantive discrimination analysis.

22 Withler v. Canada (Att'y Gen.), 2011 SCC 12, para. 33, [2011] 1 S.C.R. 396 (Can.). *See, e.g.,* Quebec (Att'y Gen.) v. A, 2013 SCC 5, para 187, [2013] 1 S.C. R. 61 (Can.) (discussing the first stage of the analysis under the title "Adverse Distinction Based on an Enumerated or Analogous Ground").

23 *e.g.,* Quebec (Att'y Gen.) v. A, 2013 SCC 5, at para 331 (Abella J., talking about a discriminatory distinction).

The Court is clear that the grounds are understood as potential markers of discrimination. As the Court explains,

> once such a distinction is established, [the adverse distinction] the court must determine whether it is based on an enumerated or analogous ground. These grounds stand as "constant markers of suspect decision making or potential discrimination": *Corbiere*, at para. 8; see also *Lavoie*, at paras. 2 and 41. As I mentioned above, although a disadvantageous law will be suspect if they are present, it will not automatically be discriminatory. As this Court has pointed out, these grounds correspond to personal characteristics that cannot be changed or can be changed only at unacceptable cost to the claimant's personal identity: *Corbiere*, at para. 13; *Withler*, at para. 33.[24]

Thus, viewing the relevant grounds as "markers of suspect decision making or potential discrimination," the Court is clear and explicit that the relevant grounds create suspicions regarding the already-established adverse distinction to establish discrimination. Therefore, the ground which is relevant in the analysis of section 15 is a ground which triggers suspicion of a prima facie discrimination. If the ground does not trigger suspicions of discrimination, it will not serve as a relevant ground in the analysis of section 15. In this case, the criterion of the first stage of the analysis of the scope of the right (which requires the establishment of the "[adverse] distinction based on grounds of discrimination") can not be passed. The crucial issue is how the Court understands the discrimination upon which it will assess the involved grounds. If the first stage of the analysis of the scope of the right is not passed, the Court does not continue the analysis of the discrimination claim.[25]

The Supreme Court of Canada in *Law* commented on the role of the various grounds of discrimination enumerated in section 15(1). It stresses the purposive character of the analysis and the function and the reason of the use of the grounds in the analysis. As it reports,

> they "reflect the most common and probably the most socially destructive and historically practiced bases of discrimination" but noted that a s. 15(1)

24 *Id*. at para. 190.

25 The Court follows this methodology in the whole body of case law over section 15 since *Andrews*. It however does not refer always to the "adverse" distinction based on grounds of discrimination. Mostly it refers to a "distinction" based on grounds of discrimination. *e.g.*, Quebec (Att'y Gen.) v. A, 2013 SCC 5, para 187, [2013] 1 S.C.R. 61 (Can.) (discussing the first stage of the analysis under the title "Adverse Distinction Based on an Enumerated or Analogous Ground") but see *Andrews* and the early case law, where we don't have the reference to the "adverse" distinction.

> claim may also be brought on an analogous ground, in accordance with the provision's wording and with a proper interpretation of its remedial purpose.[26]

Thus, the Supreme Court of Canada has understood that the enumerated grounds were selected because history showed them as "the most common and probably the most socially destructive and historically practiced bases of discrimination."[27] The effort of the Supreme Court of Canada to identify analogous grounds led the Court to underlie the rationale of the enumerated grounds of section 15(1). To make a theory of what "analogous grounds" mean, the Court needed to identify the function of the enumerated grounds, in order to reach other grounds which present a functional similarity to them. It stands to reason, that to say that "exhibit B" is analogous to "exhibit A," you need first to know what "exhibit A" means. It takes therefore a theory to make such analogies.

In doing this, the Court seems to adopt a functional and purposive approach. The Court in *Law* reviewed whether the differential treatment under dispute comes into conflict with the purpose of the equality guarantee. The Court adopts a contextual and a purposive approach. The challenge is then to reach the conclusion – what is the purpose of section 15(1). Is it only protection from discrimination or something more? A further challenge is to see how the grounds of distinction function in the particular case.

The Court in Law adopted the view that the purpose of the equality guarantee under section 15(1) is human dignity. The view that the purpose of the equality guarantee is human dignity may cause problems in the judicial analysis. Indeed there was a controversy on this issue among the Canadian legal scholars.[28] The Court finally abandoned this view eight years later in *Kapp*.[29] However, it is important that the Court in *Law* confirmed and stressed a purposive approach. As the Court explains,

> [a] ground or grounds will not be considered analogous under s. 15(1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity: see *Egan, supra*, at para. 52, *per* L'Heureux-Dubé J. If the court determines that recognition of a ground or confluence of grounds as analogous would

26 Law v. Canada (Min. of Emp't. & Immigration), [1999] 1 S.C.R. 497, para. 29 (Can.) (quoting McIntyre J. at p. 175).

27 *Id*. at para. 29.

28 *e.g*., Beverley Baines, "Equality, Comparison, Discrimination, Status" in *Making Equality Rights Read: Securing Substantive Equality Rights Under the Charter* (ed. Fay Faraday et.al., 2009).

29 R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483 (Can.).

> serve to advance the fundamental purpose of s. 15(1), the ground or grounds will then be so recognized: see, e.g., *Turpin, supra*, at pp. 1331–33.[30]

In *Law*, the purpose of the equality guarantee was seen to be human dignity. Therefore, for the Court in *Law* the discrimination could be established upon the establishment of a violation of human dignity. Whether the Court was correct or not to reach this conceptual framework of discrimination as the only meaning of discrimination being human dignity applicable to all cases is one thing. It is another though, whether the Court made the link between the grounds and the purpose of section 15. The Court linked the grounds with the purpose of the equality guarantee, at least, as this purpose was understood in *Law*. In other words, it is clear that the Court determines whether a ground is relevant, through a purposive and contextual functional approach. The criterion is whether the ground serves the fundamental purpose of section 15. I find that the Court is correct to link the relevant grounds to the purpose of the equality guarantee. This approach is in line with the link I suggest between the relevant grounds and the purpose of the *right to equal belonging*.

The lesson from Canadian jurisprudence of the "analogous" grounds is that a ground is suspicious for discrimination depending on whether and how it involves in the particular context the purpose of the equality guarantee. Therefore, the assessment of the grounds, presupposes first, a theory of what is the purpose of the equality guarantee.[31] Then, it requires a contextual and substantive approach, which looks at the full political, social and historical context of the claimant's group. It is only if the grounds indicate discrimination that the grounds of distinction can trigger sufficient suspicion as to allow the analysis to proceed to the second stage of the judicial analysis of the scope of the right. Once the question of whether the adverse distinction based on enumerated or analogous grounds is answered in the affirmative, the judge continues to answer the question in the second stage of the analysis. This question in the jurisprudence of section 15 is whether this distinction is discriminatory. Only in the case of an affirmative answer can the grounds have an alerting function. The Court seems to promote the view that the relevant ground/s are indicators of a disadvantage and thus analytical tools to pursue a substantive assessment of the treatment in dispute. This approach does not

30 Law v. Canada, [1999] 1 S.C.R. 497, para. 93 (Can.)

31 I have articulated my understanding of equality guarantees in previous chapters and more specifically in the three previous chapters. *See also* Baines, *above* note 28, at 75 (identifying principles of anti-subordination as necessary, in order to reach the correct comparisons). *See also id.* at 73, 75–77. According to Baines, "the Supreme Court of Canada's approach to equality is founded on distinguishing substantive from formal equality." *Id.* at 75. Baines also points out that, in *Andrews*, "Justice McIntyre made a distinction between formal equality and 'true equality' and that in *Law* true equality was renamed as substantive equality." *Id.*

look at the grounds as abstract and absolute factors or as being something isolated, independent from the purpose of section 15. However, in practice, the Canadian Court does not always succeed in the application of this approach.

The above understanding of the Court's purposive and contextual approach of the relevance to the analysis of section 15 grounds are in line with Sheppard's understanding of the jurisprudence of section 15. Sheppard describes two criteria the Canadian Court used for determining if there are analogous grounds: "(i) did the group constitute a 'discrete and insular minority'? and (ii) has the group experienced historical exclusion, social disadvantage, prejudice and stereotyping?"[32] She finds that these criteria evoke a conception of equality rights grounded in the fundamental purpose of redressing the historical exclusions and mistreatment of individuals from socially disadvantaged groups.[33] Essentially Sheppard has demonstrated that criteria linked to experiences of vulnerability and unequal belonging is embedded within the jurisprudence of the Supreme Court of Canada.

The purposive and contextual approach of the relevant grounds in the analysis of section 15 is also in line with Baines' insights on the relevant principle of status and non-subordination. As I have mentioned,[34] she rejected human dignity as the purpose of the right of section 15. Upon this rejection, Baines suggests instead status and an anti-subordination principle as the guiding consideration for interpreting equality rights under section 15.[35] She previously referred to Owen Fiss who contrasted status harms from harms of discrimination. As she explains, Fiss argued that it is the former which is the real challenge for the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.[36] While Fiss names this alternative principle "group disadvantaging principle," Baines and others[37] use the name of "anti-subordination principle."[38] As I have explained in Chapter 1, Fiss's legacy is in line with *the Right to Democratic Belonging*, which is my understanding of "the right to equal protection of the laws."

Furthermore, it is suggested that the purposive and contextual approach of the ground of discrimination can be seen *a contrario* in section 15(2) as it has

32 Sheppard, *above* note 9, at 41 (quoting Andrews at p. 175).
33 *Id.*
34 Baines, *above* note 28.
35 *Id.* at 74–75 (citing Owen Fiss, "Groups and the Equal Protection Clause," 5 Phil. & Pub. Affairs (1976)). *See also* Sheppard, *above* note 9, at 36.
36 *Id.* at 75.
37 *Id.* (citing Jack M. Balkin & Reva B. Siegel, "The American Civil Rights Tradition: Anticlassification or Antisubordination" *in The Origins and Fate of Anti-subordination Theory: A Symposium on Owen Fiss's Group and the Equal Protection* (Robert Post ed., 2002)).
38 *Id.*

been interpreted in *R v. Kapp*.[39] In particular, the Court proposed a test under section 15.2 which can be summarized in the following steps:[40]

a establishment of the "distinction" made on an enumerated or analogous ground proved by the section 15 claimant;
b it is then open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional.
c If the government invokes section 15.2 and provided that it can demonstrate that (1) the program has an ameliorative or remedial purpose, and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds, then, the program does not violate the section 15 equality guarantee.
d If the government fails to demonstrate that its program falls under section 15(2), the program must then receive full scrutiny, under section 15(1) to determine whether its impact is discriminatory.

In proposing this test, the Court recognizes that it does not propose a complete theory of section 15(2) and that "future cases may demand some adjustment to the framework in order to meet the litigants particular circumstances."[41] The Court again linked the grounds of distinction to the purpose of section 15. In the case that the distinction based on an enumerated or analogous ground satisfies the criterion of amelioration of a disadvantage, then it does not come in conflict with the purpose of section 15. Contrary to this, if the government fails to prove such an ameliorative function, the distinction will trigger suspicions and will receive full scrutiny under section 15(1). In other words, if the distinction does not come in conflict with the purpose of the equality guarantee, the grounds of distinction will not have the alerting function triggering suspicions for the establishment of a prima facie substantive discrimination, or in my terminology of a prima facie violation of *the right to equal belonging*.

Karst's insights support the essence of my thesis. Discussing *Bowers v. Hardwick*,[42] Karst states: "[t]he judge, in good conscience, ought to try to imagine how it feels to be Donald Baker or Michael Hardwick – to be told, over and over, that your sexual orientation makes your very self unacceptable in a fundamental way, that you cannot belong."[43] Paraphrasing Karst, he has

39 R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483 (Can.).
40 *Id*. at paras 40–41.
41 *Id*. at para.41.
42 Bowers v. Hardwick, 478 U.S. 186 (1986).
43 Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 208 (1991). *Bowers* was about a Georgia sodomy law which criminalized oral and anal sex in private between consenting adults. This law was upheld as constitutional. The plaintiff was homosexual. While the law did not differentiate between homosexual sodomy and heterosexual sodomy, the majority was based on a

seen in *Bowers* the ground of sexual orientation as the factor the judge needs to take into account asking the following questions: (1) how would you feel if you were a member of that group? (2) how would you feel the impact of the impugned legislation? (3) would you feel that you don't belong to the society? Therefore, Karst sees that the grounds of discrimination indicate the feeling of non belonging in this certain case. The main question is whether the distinction upon the certain grounds "makes your very self unacceptable in a fundamental way, that you cannot belong."[44]

Reflecting on all the above insights, I suggest that the relevant questions to determine whether a ground is a *ground of unequal belonging* try to answer whether the criteria of distinction are in the certain case of suspicion for causing unequal belonging in a certain society. In particular, these questions include: (1) how much destruction of unequal belonging accrues via the distinction based on the specific ground for the certain society and (2) whether the specific ground of distinction has the effect of unequal belonging in the particular context of the claim. Therefore, the relevance of the grounds should be understood based on their actual function and effect in the analysis of the unequal belonging in the particular case with regard to the particular facts.

In sum, any ground of distinction which contributes to a feeling of unequal belonging in society should be considered as *ground/s of unequal belonging*. The more the alerting function the ground of distinction has with regard to the unequal belonging, the greater is the suspicion of violation of the right. In particular, the function of the *grounds of unequal belonging* is such as to trigger suspicions for the establishment of a prima facie violation of at least one of the three inherent rights in *the right to equal belonging; the rights to secure and/or "free-identity" and/or comfortable belonging in a community of equals*. In other words, following the analysis in the previous three chapters, I mean this function which contributes to the prima facie establishment of at least one of the following contextual factors: (i) prejudice, stereotype, perpetuation and/or worsening of a pre-existing disadvantage, systemic or institutionalized political disadvantage or other way of oppression which renders the belonging of the claimant unsafe/insecure; (ii) a threat or oppression of the identity freedom of the members; and/or (iii) anxious belonging because of the violation or the threat of violation of the secure and "free-identity" belonging. Therefore, anyone who invokes a *ground of unequal belonging* should justify how this ground functions in the above mentioned way, provided that someone is talking about *the right to equal belonging* and has been convinced by the three previous chapters. Even the most commonly enumerated grounds of race and gender will not be *grounds of unequal belonging*, if they don't trigger suspicions for the establishment of a prima facie violation of the *right to equal belonging* in the

reasoning that there is no "right to homosexual sodomy." Instead, the dissenting opinion was based on arguments of privacy. This case was overturned in 2003.

44 *Id*.

certain case, that is the violation of at least one of *the rights to secure, and/or "free-identity" and/or minimum comfortable belonging in community of equals.*

So far, in this chapter, I have argued about the purposive and contextual approach of the relevant grounds of distinction which have an alerting function in the analysis of *the right to equal belonging*. If the reader is convinced, she/he can now see some unavoidable consequences in the analysis of *the right to equal belonging*. Section II discusses three consequences: (i) the singular, fixed and abstract grounds approach is rejected; (ii) the mirror comparator approach is also rejected, and (iii) it seems to be useful, methodologically and substantively, to make a distinction of *inter- and intra- group complaints of unequal belonging*.

II. Consequences for the Legal Analysis

i. Singular, Fixed and Abstract Grounds Approach is Rejected

If anyone agrees with the functional and purposive approach of the *grounds of unequal belonging*, argued in Section I, she/he will, as a consequence, agree that a single, fixed and abstract grounds analysis should be rejected. I will explain first what I mean by the description of singular, fixed and abstract grounds. I will explain this through examples of the approach followed by the Supreme Court of the United States in the affirmative action cases involving the ground of race for admission to institutions of higher education. I will then offer three arguments against this approach. All my three arguments are consequences of the functional, purposive and contextual approach of the *grounds of unequal belonging* and their alerting function toward the prima facie establishment of *the right to equal belonging*.

Reviewing the cases of affirmative action programs in the institutions of higher education at the Supreme Court of the United States,[45] one can observe that according to the prevailing approach in the Court, the mere proof of a distinction which involves race is sufficient to establish a suspicious discriminatory distinction. According to this prevailing approach, depending on whether the grounds of that distinction fall in some predetermined categories, this classified ground determines and distinguishes automatically the required

45 University of California Regents v. Bakke 438 U.S. 265 (1978) (finding that the program, was a quota system and holding that race can only be a factor among others in the assessment of the student for admission and thus the program was not constitutional), Grutter v. Bollinger 539 U.S. 306 (2003) (finding that the program was constitutional as race was one of the many factors for the assessment of the student for admission), Gratz v. Bollinger 539 U.S. 244 (2003) (finding that the University of Michigan's point system, awarding 20 points to racial minorities, was unconstitutional because it did not ensure individual assessment) Fisher v. the University of Texas at Austin 133 S. Ct. 2411 (2013) (finding that the lower court needed to decide again with the correct standards of review whether the program was narrowly tailored and remanding the case to the lower court.)

standard of judicial review. Any distinction involving race is classified as a suspicious one, deserving the strict scrutiny standard of review. Therefore, the suspiciousness of the certain ground and consequently the strictness of the standard of judicial review is embedded within the classification of the ground in an abstract and fixed way.[46]

The test the Supreme Court of the United States applies over the distinctions based on the ground of race is an application of the "doctrine of suspect classifications."[47] This is the modern doctrine of the equal protection clause adopted by the Supreme Court of the United States. The main feature of this doctrine is the adoption of three categorizations of the classifications and three respective levels and standards of judicial review. Non-suspect classifications are subject to a rational basis review. Under this level of review, the standard of review requires that the classification used by the government be "rationally related to a legitimate government interest." Quasi-suspect classifications are subject to a level of an intermediate scrutiny. Under this level, the standard of review requires that the classification be "substantially related to an important

46 *See, e.g., generally*, Richard H. Fallon, Jr., "Strict Scrutiny," 54 UCLA L. REV. 1267 (2006–2007) (explaining the doctrine of suspect classifications and the strict scrutiny); Geoffrey R. Stone et al. *Constitutional Law* 453–721 (2013) (explaining "Equality and the Constitution" and commenting about the equal protection methodology and the rational basis review at 497–520; see for the equal protection methodology and the heightened scrutiny and the problem of race at 520–629; see for the structure of strict scrutiny at 535–540; see for the contemporary application of strict scrutiny at 591–598; see for the equal protection methodology and the heightened scrutiny and the problem of gender at 629–673; see for the equal protection methodology and the problem of sexual orientation at 520–629; see for the equal protection methodology and other candidates for heightened scrutiny at 696–721). *See also e.g.*, Catherine A. MacKinnon, *Sex Equality*, (2007) (explaining strict scrutiny and Korematsu at 70–78; strict scrutiny and affirmative action in Grutter at 109–130; *See also* for strict scrutiny in Frontiero v. Richardson at 231–238; intermediate scrutiny in Craig v. Boren at 222–231.) *See also e.g.*, Laurence H. Tribe, *American Constitutional Law* 1436–1673 (2nd ed. 1988) (explaining the doctrine of suspect classifications); at 1451–1454 (commenting on equal protection of the laws and strict scrutiny); at 1465–1466 (explaining the suspect classifications and forms of invidious government action). *See also, e.g.*, Minow, *above* note 6, at 103 (for her description and explanations of the doctrine.). In particular, as she reports: "[f]or the purpose of equal protection analysis, the Supreme Court has at times applied three levels of scrutiny, depending upon the interests it believed were at stake. The lowest level is applied if the Court sees no issues involving a suspect class or a fundamental right; the test whether the state action bears a rational relationship to a legitimate state purpose. See United States R.R. Retirement Board v. Fritz, 449 U.S. 166 (1980);San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). The intermediate level is applied to cases involving gender or illegitimacy; this test asks of the classification is substantially related to the achievement of an important governmental purpose. See *Craig v. Boren*, 429 U.S. 190 (1976). Finally, the strict scrutiny level requires the government to prove that a compelling government interest justifies infringement on a fundamental right or a suspect class." *Id.* at 103.

47 *See e.g.*, Stone et al., *above* note 46, at 497–629.

government interest." Suspect classifications are subject to strict scrutiny. Under this higher level of review, the standard of judicial review requires that the classification is "narrowly tailored to serve a compelling government interest."

Therefore, the doctrine of suspect classifications presupposes a determination of the kind of classification at stake and then an application of the respective standard of judicial review. The determination of which type of classification is at stake will create a pattern of the analysis in each case. The "tiers" approach of the Supreme Court of the United States is a ground based criterion, focused solely on the ground of distinction. Classifications based on race, ethnicity and national origin, [citizenship and exercise of fundamental rights] are classified as suspect classifications. Classifications based on gender and [legitimacy, non marital children] are classified as quasi suspect classifications. Other classifications are categorized as non suspect classifications.[48] Therefore, the analysis of the equal protection of the laws by the Supreme Court of the United States is a "grounds-first" rather than a "discrimination-first" approach.

In the doctrine of suspect classifications, the most important question is the ground of classification when the claimant invokes "*the right to equal protection of the laws*" at the Supreme Court of the United States. The answer will indicate the required level of scrutiny. According to the doctrine of suspect classifications, the classifications based on race, ethnicity and national origin, [citizenship and exercise of fundamental rights] are classified as suspect classifications. Suspect classifications should be "narrowly tailored" to serve a "compelling government interest." Classifications based on gender and [legitimacy, non marital children] are classified as quasi-suspect classifications. In that case, the classification used by the government should be proved to be "substantially related" to "an important government interest." Other classifications are categorized as non-suspect classifications. In the last case, the classification used by the government should be "rationally related" to the "legitimate government interest." The Court applies, therefore, a "tiers" system to determine, according to the ground used in the classification in dispute, which standard of judicial review is the appropriate.

This lack of theory of the relevant grounds leaves unanswered many important questions revealing, thus, the insufficiency of "the doctrine of the suspect classifications" as it stands today in this Court. In particular, under "the doctrine of suspect classifications," the mere fact of the use of a certain ground in the program at stake triggers greater or fewer suspicions of unconstitutionality. Thus, the Supreme Court test disregards any assessment of whether a ground triggers suspicions of unconstitutionality. There is no questioning to define "equal protection of the laws" or "discrimination." Only then, can one explain what are the relevant grounds in each case that trigger suspicions for violation

48 Understanding the tiers systems, I have much benefited from the course of Separation of Powers and Fourteenth Amendment by Professor's Tomiko Nagin-Brown in Spring 2014 at Harvard Law School.

of the right, why and in which contexts. Second, according to "the doctrine of suspect classifications," the principles of justice must confirm that the hierarchy itself is proper. For example, questions remain about why one particular ground is more suspect than the other, as it is used in the particular case, so as to trigger a more rigorous standard of judicial review? Third, one needs a justification based on principles of justice over this permanent and a-contextual classification of the grounds. One needs a theory to justify why one ground always triggers the same suspicions, or at least, always more or less suspicions than other grounds. Instead, as I have suggested in this chapter, according to the theory of the *right to equal belonging*, the ground of classification which triggers suspicions is the ground which is an indicator of a vulnerability and a disadvantage of unequal belonging in the certain case. These are *the grounds of unequal belonging*.

Fifth, "the doctrine of suspect classifications" leaves unanswered the question of the multiple grounds of distinction. One needs explanations based on principles of justice on how a program which uses, for instance, both gender and race will be analyzed under the tiers system, or whether one ground will be hidden in the shadow of the other. As long as the tiers system implies a single-ground approach, the doctrine contradicts with the reality that often multiple grounds of distinction coexist. The "doctrine of suspect classifications" therefore leaves unquestioned the choice of the particular ground, which is, however, sometimes arbitrary or a matter of real politics. Such a singular ground approach is hardly justified as a matter of justice, and it has the danger to lead to an unrealistic and unfair outcome.

The prevailing view of the Supreme Court of the United States does not offer any theory to respond to all these deficiencies of "the doctrine of the suspect classifications," in the context of the race-conscious, affirmative action programs. Only after theorizing about the grounds of distinction, can one explain in each case the standard of judicial review a certain classification leads to. In particular, applying a strict scrutiny standard of review on any race-conscious affirmative action programs in higher education, the Supreme Court of the United States starts, paradoxically, with a general presumption of unconstitutionality. Under *the Theory of the Right to Democratic Belonging*, the application of a strict scrutiny standard of review can be the appropriate standard of review for some race conscious affirmative action programs in a specific case. However, this should be the result of the conceptual and contextual analysis and not a general analytical starting point. The fixed and automatic application of the respective standard of review, triggered merely because of the ground of discrimination, without more analysis, cannot be justified as a principle of justice. Programs outside a court's purview need not have a remedial and ameliorative character but can indeed trigger a more rigorous standard of review. This can be the result of a contextual analysis based on a comprehensive theory of "the right to equal protection of the laws."

In sum, the doctrine of suspect classifications is a grounds-based doctrine, but it does not provide a theory about the relevant grounds of distinction. This

lack of theory of the relevant grounds leads to the fixed, automatic and generic correspondence of certain predetermined grounds to a certain predetermined standards of judicial review. This lack of theory of the relevant grounds is rooted in the lack of a settled comprehensive theory of "the right to equal protection of the laws," or in the understanding of equal protection of the laws as anti classification principle. For Siegel the courts embrace "the doctrinal presumption that racial classifications are unconstitutional."[49] This comes as a natural consequence of understanding the equal protection of the laws as a right to "anti classification" rather than as a right to "anti-subordination."

The doctrine of suspect classification is not a disadvantage/discrimination-first approach. Instead, the doctrine emphasizes the ground itself, rather than the disadvantage. But the doctrine also fails to properly assess the distinction itself. It assesses the grounds in a fixed and a-contextual way; not the particular distinction based on the particular grounds in the particular context. Therefore, the above described prevailing approach in the Supreme Court of the United States over any classification involving the ground of race is a single, fixed and abstract grounds-based approach, and it is rejected for three main interrelated and overlapping reasons.

Moreover, the prevailing approach of the Supreme Court of the United States over any racial classifications is based on a denial to recognize that there are members of certain racial groups which are more vulnerable to be discriminated against and having an unequal membership in the society. For instance, this lack of recognition of members of vulnerable racial groups is very explicitly illustrated in a concurring opinion of Justice Thomas:

> [t]he Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. "At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." *Missouri v. Jenkins,* 515 U.S. 70, 120–121, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring). "It is for this reason that we must subject all racial classifications to the strictest of scrutiny." *Id.,* at 121, 115 S.Ct. 2038.[50]

In contrast, the theory of *the grounds of unequal belonging* accepts that members of some groups are more vulnerable to discrimination and unequal belonging in society. The essence of *the grounds of unequal belonging* is that the relevant grounds of distinction illustrate a risk of vulnerability for unequal belonging, related to the membership of certain grounds. The Supreme Court

49 Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassifcation Values in Constitutional Struggles over *Brown*", 117 Harv. L. Rev. 1470, 1480 (2003–2004.

50 Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2422 (2013) (Justice Thomas concurring).

of the United States, instead of explaining why a certain racial classification deserves strict scrutiny, subjects immediately all racial classifications under strict scrutiny.[51] The Court subjects all racial classifications to the strict scrutiny standard of review without any convincing conceptual or contextual analysis. Any real analysis takes place to answer whether the strict scrutiny is satisfied, rather than whether the strict scrutiny is applicable. This approach likely stems from the history of distinctions based on race that they have "a destructive impact on individual and our society"[52] and that they "demean[] us all."[53] Instead, the *Theory of the Right to Democratic Belonging* demands explanations of when any distinction based on any ground illustrates a risk of vulnerability of unequal belonging in the specific context. The thesis therefore is a theory of *the Right to Democratic Belonging* and consequently a theory on the *grounds of unequal belonging*.

If the Court rethinks its strict scrutiny test, jurisprudence may lead to a change of the prevailing judicial approach. The Court very often quotes this jurisprudence as classic to support that "any racial classifications deserve strict scrutiny." In particular, one needs justifications, what *Fisher v. the University of Texas at Austin*, a challenge against a race conscious affirmative action in the admissions of a university, shares with *Korematsu v. United States*.[54] *Korematsu* was a case over the constitutionality of Executive Order No. 9066, issued by President Roosevelt, some two months after the United States declared war against Japan. Fred Toyosaburo Korematsu was convicted of remaining in a portion of a military area from which persons of Japanese ancestry had been ordered excluded. His conviction was affirmed by the majority of the court and Korematsu brought certiorari to review this judgment.

51 *See e.g., Fisher*, 133 S. Ct. at 2422 (Justice Thomas concurring, stating that "[u]nder strict scrutiny, all racial classifications are categorically prohibited unless they are "'necessary to further a compelling governmental interest'" and "narrowly tailored to that end." *Johnson v. California,* 543 U.S. 499, 514, 125 S. Ct. 1141, 160 L.Ed.2d 949 (2005) (quoting *Grutter,* at 327, 123 S.Ct. 2325). This most exacting standard "has proven automatically fatal" in almost every case. *Jenkins, above,* at 121, 115 S. Ct. 2038 (Thomas, J., concurring). And rightly so.").

52 *Id.* Justice Thomas concurring, stating "'[p]urchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society.' *Adarand Constructors, Inc. v. Penã,* 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (Thomas, J., concurring in part and concurring in judgment)."

53 *Id.* (stating, "'[t]he Constitution abhors classifications based on race' because 'every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.' (quoting Grutter v. Bollinger, 539 U.S. 306, 353 (2003) Thomas, J., concurring in part and dissenting in part.")).

54 Korematsu v. United States, 323 U.S. 214 (1944). See also, Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding the constitutionality of the order issued by the military commander of the western defense command imposing a curfew on all persons of Japanese ancestry living in the West Coast.)

The Court explained why this restriction was under the strict scrutiny standard of judicial review. As they say,

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[55]

One needs contextual explanations as to why the Court in both *Fisher* and *Korematsu* apply the same rule. How is possible that the same rule applies in the same way in both cases of exclusion and inclusion? What is the primary principle of justice we try to apply? How does this principle, if any, stand in terms of exclusion and inclusion? Whatever this principle is, if any, it can not stand toward exclusion and inclusion in the same way. These are two opposite contexts and they can't both stand in the same way with regard to judicial review over equal protection of the laws.

Furthermore, one needs explanations of how the same rule of strict scrutiny applies in both *Loving v. Virginia*[56] and *Fisher v. the University of Texas at Austin* (2013). The Warren Court was correct to apply strict scrutiny over the prohibition of interracial marriages, which restricted the freedom of the Lovings to enjoy their life as a married couple, like the other non-interracial couples. The State of Virginia prevented marriages between persons solely on the basis of racial classification. The State of Virginia excluded these people sending them the message that they did not belong in their state because they were of the "wrong" race to form a married couple. But what does this case share with *Fisher, Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *University of California Regents v. Bakke*, 438 US. 265 (1978), which were challenges against race-conscious affirmative action programs? What does the exclusion of the Lovings from a community of equal citizens share with the inclusion of the underrepresented students in institutions of higher education? What is the relationship between "non-belonging" and "equal belonging" in respect of "the right to equal protection of the laws"? In

55 *Id.* at 216. As the Court goes on to say, "Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin." *Id.* at 218–219.

56 Loving v. Virginia, 388 U.S. 1 (1967).

other words, what is the relationship of having an equally secure, "free-identity" and minimum comfortable belonging in a democratic society and in an institution of higher education and having an unsafe, insecure, uncomfortable belonging with identity inequality and oppression in a society? Certainly, it cannot be the same.

Have a look at *Loving* and *Korematsu*. Race in *Loving* was obviously *a ground of unequal belonging*. In *Korematsu* and *Hirabayashi* there was a clear cut violation of *the Right to Democratic Belonging*. It was a distinction based on stereotype and prejudice and perpetuation and worsening of a pre-existing disadvantage. It was a clear violation of *the right to secure belonging in a community of equals*. It was also a violation of *the right to* "free-identity" belonging *in a community of equals*. It was also a violation of *the right to minimum comfortable belonging in a community of equals*. These cases would be very easily seen to be violating *the minimum content/core of the Right to Democratic Belonging*. Such distinction in *Loving* worsened a pre-existing disadvantage faced by the Lovings and other interracial couples. The distinction in *Korematsu* created conditions of identity and emotional dominance in a public relationship. Both cases were a clearcut violation of *the Right to Democratic Belonging*.

Before stating briefly the three reasons to reject a grounds-based approach I need to point out that the doctrine of suspect classification could have been very promising if the approach was becoming more substantive, contextual and purposive. In particular, the test could assess the distinction in context, rather than the abstract, fixed and singular grounds. In this case, the test could ask whether the particular distinction is suspiciously in conflict with the purpose of the equal protection of the laws. Then, the doctrine could only be promising provided that the purpose of the equal protection of the laws would be interpreted in a substantive way. Therefore, the doctrine can be rearticulated after a more substantive interpretation of the purpose of the equal protection of the laws. It can then be accompanied with a more substantive, contextual and purposive way to serve justice for real people in real societies.

The first reason a singular, fixed and abstract grounds-based approach is rejected is that such approach cannot reveal and correspond with the dynamic nature of the involved identities and the claimant's disadvantage. First, *the grounds of unequal belonging* need to be seen purposively and in context. In my argument, the grounds are used to indicate some identity which needs to be free and a disadvantage which needs to be ameliorated and/or not to be worsened. But identity and disadvantage are plural and dynamic in nature. How can then any approach use *the grounds of unequal belonging* in a non-plural and dynamic way? Second, people are simultaneously members of various groups. Ponder on just one example: an Aboriginal woman with disabilities. A strict application of a fixed, pure and singular ground-based doctrine calls us to choose either race, gender or disability as the relevant ground of distinction. However, this dichotomy among the involved grounds does not correspond to the reality of the Aboriginal woman in my example. Third, time and personal

stories, like inter-group marriages and disability, also play a role in the formulation of a certain disadvantage and/or identity. Interracial marriages may result in a conversion to a new religious or cultural group and/or a mixture of the two. Also, one can become a person with disabilities, in different degrees and types at different times in his or her life. The degree and nature of disability may affect a person in different ways and in different periods of his or her life; and the disability may also affect the identity and disadvantage a person may face. Thus, the grounds which are relevant to illustrate the real disadvantage and involved identities are often multiple and overlapping.

The second and third reasons against a singular, fixed and abstract grounds-based approach relate to the suitability of the particular chosen ground of distinction. In particular, the second reason is that such an approach may not reveal and correspond to the reality of group heterogeneity. To hide that a group is heterogeneous is dangerous for individual freedom and the right to self-identification of the members of a categorized group. Having already argued about the need to accept multiple *grounds of unequal belonging*, I also must emphasize the reverse: the acceptance of group heterogeneity is in conflict with a fixed, singular and abstract ground approach. One cannot have allegiance to both of them and hold, at the same time, a consistent theory. Instead, the acceptance of group heterogeneity partners with a need for a contextual and substantive approach of the grounds.

The third reason against a singular, fixed and abstract grounds-based approach is that the choice of the grounds of classification may be arbitrary and be related to real politics instead of justice. Are there natural groups of people or groups of people who have relatively more power than other groups? The choice of a certain ground by the legislature cannot go unquestioned. The grounds of distinction might have been chosen in a majoritarian or in a political spirit serving other interests than justice. Thus the grounds may ignore the interests of the real vulnerable groups the claimant may find him/herself belonging to. What then is the role of the judge in a case where a member of this categorized group is challenging the categorization itself?

This general methodology of the tiers system has not been without criticism in the United States.[57] The departure from the strict scrutiny jurisprudence in certain cases has also been supported before the Court. It occurs for example in *Fisher I*.[58] However, such arguments were not invoked by the Respondents

57 *See, e.g.*, Minow, *above* note 6, at 103, n. 9 (stating that "[s]everal justices through the years have expressed their dissatisfaction with this tiered mode of analysis and disputed whether the Court actually abides by it. See e.g., *Craig v. Boren*, 429 U. S. at 211–12 (Stevens, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marchall, J., dissenting)."). *See also* Stone et al., *above* note 46.

58 Brief of the American Civil Liberties Union supporting the Respondents at 3–4 Fisher v. University of Texas at Austin, 133 S. Ct. 2411(2013) (No. 11–345) (*e.g.* stating, " [w]hile the judgment below can be affirmed by applying strict scrutiny, we urge the Court to reconsider the appropriateness of applying strict scrutiny in

themselves.[59] The Respondents' rhetoric was based mainly on the need to prove that diversity is a compelling reason, which meets the standards of strict scrutiny.[60] However, other voices have already argued what I have seen as the reason to depart from the strict scrutiny jurisprudence in this case:

> [t]he historical purpose of equal protection and of the strict scrutiny standard was to secure the rights and equal opportunities of disenfranchised people. This history affirms the importance of attention to persisting inequalities in conducting equal protection analysis. Far from a position of blanket skepticism, equal protection contemplates and at times even necessitates race-conscious measures to secure the guarantee of equality.[61]

These voices emphasized the harm of keeping race neutral policies, instead of starting the analysis from the automatic predetermination of established racial discrimination that was at stake in *Fisher*.[62] They pointed out the need for

> this case.... We respectfully suggest that the time has come to reevaluate that approach and that the Court might usefully begin with the famous observation by Justice Holmes that 'a page of history is worth a volume of logic.' *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)... Efforts to encourage diversity, like UT's admissions policy, are not the same as exclusionary policies targeted at disadvantaged minorities, and they should not be subject to the same legal standard. Doing so creates a false equivalency that makes it unnecessarily difficult to sustain programs and policies designed to confront inequality and promote an inclusive democracy)." *Id.* at 3–4.
>
> *See also* at 8 (referring to United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)). They go on to explain: "[t]he Court explained that the 'more searching judicial inquiry' should apply because 'prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.'" *Id.*

59 *See generally* Brief for Respondents, Fisher v. University of Texas, 133 S. Ct. 2411 (2013) (No. 11–345) Instead, the Respondents supported that "[t]here is no basis to reconsider or overrule existing precedents." *Id.* at 50–55.

60 *e.g., id.* at 39.

61 *Id.* at 10.

62 *Id.* at 13–14. As they state: "[a]gainst calls for color blindness, early desegregation rulings were attentive to context and the purpose behind state actions. When the Court in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954), finally repudiated *Plessy* a half century later, it 'did not speak about the wrongs of racial classifications. Instead, Brown focused on the harms of segregation.' Reva B. Siegel, *Foreword: Equality Divided*, 127 Harv. L. Rev. 1, 9–10 (2013). Similarly, in *Loving*, the Court probed the purpose of the racial classifications at issue, finding them illegitimate 'as measures designed to maintain White Supremacy.' *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Courts generally understood that the strict scrutiny of racial classifications was not color blind and 'wielded the principle to protect blacks against status-enforcing harm but did not employ it to constrain race-based state action designed to alleviate segregation.' Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 Harv. L. Rev. 1470, 1518 (2004) (citing *Bustop, Inc. v. Bd. of*

rethinking the conception of equality as it appears in the strict scrutiny jurisprudence over race conscious affirmative action programs. I affirm their understanding[63] of the limits of Justice Powell's conception of equal protection. Pointing out these limits, they also reminded how these limits have been already highlighted by minority opinions at this Court. They retell the following:

> [i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot – we dare not – let the Equal Protection Clause perpetuate racial supremacy. [Justice Blackmun,] Bakke, 438 U.S. at 407; see also id. at 327 (Brennan, J., concurring in judgment in part and dissenting in part)("[W]e cannot let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."); id. at 402 (Marshall, J.)("I fear that we have come full circle. After the Civil War our Government started several 'affirmative action' programs. This Court in the Civil Rights Cases, 109 U.S. 3 (1883), and Plessy v. Ferguson destroyed the movement toward complete equality. For almost a century no action was taken, and this non action was with the tacit approval of the courts.").[64]

I find the above minority views closer to *the Theory of the Right to Democratic Belonging*, and I embrace them.

Furthermore, they very correctly pointed out the need for a contextual approach, reminding us that "[t]he historical and factual context in which these cases arise is critical."[65] As I have illustrated, a general characteristic of the *Theory of the Right to Democratic Belonging* is its contextual feature.

The prevailing view of the doctrine of suspect classifications is different from the test the Supreme Court of Canada applies. Both are grounds-based approaches, but the Canadian approach leaves more room for a functional way of analysis of the grounds. Section 15(1)[66] enumerates some grounds, but the enumeration is not exhaustive. It leaves thus room to identify other analogous grounds.[67] Finding the analogous grounds, the

Educ., 439 U.S. 1380, 1382–83 (Rehnquist, Circuit Justice 1978)); *see also* J. Skelly Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 16 Case W. Res. L. Rev. 478, 489 (1965)." *Id.*

63 *Id.* 14–15.

64 *Id.*

65 *Id.* at 24 (quoting Parents Involved in Cmty. Sch., 551 U.S. at 804 (Breyer, J. dissenting)).

66 Canadian Charter at § 15. Section 15 came into force on August 17, 1985.

67 *See e.g.*, Denise Reaume, "Dignity, Equality, and Comparison" *in Philosophical Foundations* 10 (Deborah Hellman and Sophia Moreau eds., 2013) (stating that, "the Canadian Charter adopts a grounds based approach. It recognizes a right to equal benefit and protection of the law without discrimination on the basis of a list of grounds, which list can be expanded by analogy."). *See also, e.g.*, Withler v.

Court opens the door to explore the function of the relevant grounds of distinction that is shared by other grounds. This function should be related to the suspicions of the violation of the purpose of the equality rights under section 15.

I suggest that the *Theory of the Right to Democratic Belonging* walks on the right conceptual path, understanding "equal protection of the laws" in terms of belonging. It is a purposive and substantive approach. In this capacity, it finds the essence of "the equal protection of the laws" in its purpose; *to enjoy an equally secure, "free-identity" and minimum comfortable belonging in a democratic society.* In this capacity, it is again a substantive and contextual approach, which simply calls for applying the principles of justice in the particular facts of the particular case. This approach is more in line with other minority opinions in this Court,[68] and it departs from the prevailing view of the Supreme Court of the United States over the race-conscious affirmative action programs.

Canada (Att'y Gen.), 2011 SCC 12, para. 33, [2011] 1 S.C.R. 396 (Can.) (explaining that "[t]he first step in the s. 15(1) analysis ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*. In *Andrews*, it was held that s. 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them.)." *See also* Quebec (Att'y Gen.) v. A, 2013 SCC 5, para. 187, [2013] 1 S.C.R. 61 (Can.) (per LeBel, J., analyzing under the title "*Adverse Distinction Based on an Enumerated or Analogous Ground*.").

68 *See* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 800–01 (2007) (Stevens, J., dissenting) ("rigid adherence to tiers of scrutiny obscures *Brown*'s clear message"); *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting) ("[A]s I see it, government decision makers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.") (citation omitted); *id*., at 282 (Breyer, J., concurring in judgment); *Adarand Constructors, Inc*., 515 U.S. at 243 (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."); *Wygant v. Jackson Bd. of Ed*., 476 U.S. 267, 301–302 (1986) (Marshall, J., dissenting) (when dealing with an action to eliminate "pernicious vestiges of past discrimination," a "less exacting standard of review is appropriate"); *Fullilove v. Klutznick*, 448 U.S. 448, 518–519 (1980) (Marshall, J., concurring in judgment); *Bakke*, 438 U.S. at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part) ("racial classifications designed to further remedial purposes" should be subjected only to intermediate scrutiny). *See also* Brief of the American Civil Liberties Union supporting the Respondents, at 25–26 Fisher v. University of Texas, 133 S. Ct. 2411(2013) (No. 11–345) (reporting the above set of minority opinions). As they conclude: "[a]n equal protection doctrine that fails to distinguish invidious use of race from considerations of race intended to redress inequality and promote the promise of an open and inclusive society fails its historic purpose and the principals of our democracy. The Constitution compels a different answer." *Id*. at 26.

Which role of the judge and policymaker does justice require? A blind and unquestioned fixed, abstract and singular ground approach does not provide good answers.

ii. Mirror Comparator Approach is Rejected

If one follows a fixed, singular and abstract-grounds approach, the issue of whether the Claimant in judicial review or a potential Beneficiary in public policy is the appropriate comparator to the Designated Beneficiaries will more probably inherit the approach's formalistic characteristics.[69] A formalistic choice of the appropriate comparator will lead inevitably to injustices. Such formalistic approach can be seen in the mirror-comparator approach,[70] which is rejected, under the suggested contextual, substantive and purposive approach. Instead, the suggested approach is in line with a choice of the comparator based on a substantive and relational analysis of the full context of the Claimant or potential Beneficiary and the Designated Beneficiaries.

My suggestion calls for answering the question based on the understanding of *two primary relationships*. I suggest that the judge and the policymaker should first understand the relationship of the Designated Beneficiaries of the program to the provided Benefit *e.g.*, educational opportunities. This Benefit is the *good of reference*, and this relationship is the "relationship of Designated Beneficiary to the *good of reference*." Then, the judge or the policymaker should understand the relationship of the Claimant or the potential Beneficiary respectively to the same *good of reference* in the light of the needs of the Claimant and the purpose of the *good of reference*. This second relationship is the "relationship Claimant to the *good of reference*." These are *the two primary relationships* that the whole analysis depends on.

The understanding of *the two primary relationships* should be pursued in a contextual, substantive and purposive way. It is only then, that the judge and/or the policymaker should compare the two relationships in terms of needs to see if these relationships are arguably comparable. These needs-based relationships should be compared in the light of the purpose of the equality guarantee. I have been arguing in this book that this purpose should be seen to be the

69 For the purposes of this book when I use the terms Claimant and the Potential Beneficiary together I meant to show the [potential] claims both before the judiciary and the policymakers. In particular, Claimant is an individual or a group of individuals who initiate litigation challenging the impugned legislation. Potential Beneficiary or Claimant during the policy making is an individual or a group of individuals whose interests allegedly may be affected with the policy under consideration and the policymaker should consider their claim.

70 *e.g.*, Canada (AG) v Lavell, [1974] S.C.R. 1349 (Can.) (upholding Section 12(1)(b) of the Indian Act R.S.C. 1970, c. I-6., which deprived Indian women, but not Indian men, of their status for marrying a non-Indian person); Bliss v Canada (AG) [1979] 1 S.C.R. 183 (Can.) (upholding that women were not entitled to benefits denied to them by the Unemployment Insurance Act during a certain period of pregnancy.) Both these cases have been overturned.

equal belonging in a democratic society. The comparison is not an abstract one between the Claimant to the Designated Beneficiaries. Rather, relationships in context should be compared. But even in the case of the arguable comparable relationships, the Claimant can not be seen as the appropriate comparator, if she/he does not prove an arguable harm of unequal belonging from her/his exclusion.

My suggestion of finding the appropriate comparator is in line with the guidelines the Supreme Court of Canada has provided for choosing the appropriate comparator; it falls within the general contextual, purposive, and substantive approach the Supreme Court of Canada supports or at least professes, but not always however applied in a consistent way. My suggestion is however more specific. In particular, the Court calls for taking into account "the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context."[71] The Court in *Withler* summarized the concerns, which have been stated in the Canadian scholarship on the use of the mirror comparator approach.[72] At the same time, the Court was emphasizing the fact that a claimant may be impacted by many interwoven grounds of discrimination.[73] The Court is right to emphasize that "[a]n individual's or a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination."[74] Only with a reference to all the relevant contextual factors can one understand the impact of the denial of a benefit or the imposition of the burden on the Claimant. Only assessing the full context both of the claim and the Claimant can one reach the appropriate comparator.

71 Withler v. Canada (Att'y Gen.), 2011 SCC 12, para. 58 [2011] 1 S.C.R. 396 (Can.) (citing (Daphne Gilbert, *Time to Regroup: Rethinking Section 15 of the Charter*, 48 McGill L.J. 627 (2003); Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 Queen's L.J. 179 (1993); Dianne Pothier, *Connecting Grounds of Discrimination to Real People's Real Experiences* 13, C.J.W.L. 37 (2001)). As the Court stated: "[a] further concern is that allowing a mirror comparator group to determine the outcome overlooks the fact that a claimant may be impacted by many interwoven grounds of discrimination. Confining the analysis to a rigid comparison between the claimant and a group that mirrors it except for one characteristic may fail to account for more nuanced experiences of discrimination. Thus, in *Lovelace*, the Court contemplated multidimensional comparisons, pointing out that 'locating the relevant comparison groups requires an examination of the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context' (para. 62). See also *Law*, at para. 57, and *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703, at para. 47. An individual's or a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt[.]." *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

Similarly, Sheppard discusses the problems that arise in the Canadian jurisprudence with choosing the comparator group, reporting narrow and formalistic interpretations.[75] She also observes that while this reasoning was explicitly overruled,[76] modern cases[77] "have fallen into the same traps of legal formalism."[78] She very correctly states that the problem is not with the general idea that equality is a comparative concept. As she says: "[r]ather, it lies in the failure of the Court to connect individual instances of alleged discrimination to larger patterns of social exclusion and discrimination – patterns that are rooted in a group-based or grounds-based analysis."[79] Sheppard goes on to emphasize that even when discrimination claims are based on concerns about under-inclusiveness, equality analysis should not be narrowed to a competition between socially disadvantaged groups. She suggests that the analysis of exclusion should remain rooted in the larger comparative dimensions of inequality.[80] Therefore, Sheppard calls for a substantive, purposive and contextual understanding of discrimination, and in her own terms, "inclusive equality."

In sum, my suggestion for finding the appropriate comparator is an application of a substantive, purposive and contextual approach of the analysis of *the right to equal belonging* or in other words, *the right to belong to a community of equals*. Instead of searching for a comparator in the abstract, the suggested analysis calls for looking for comparable relationships in terms of needs, using a point of reference. For this purpose it assesses the full context of the Claimant and the Designated Beneficiaries in relation to *the good of reference*. The provided Benefit/*good of reference* is the point of reference for the comparison. The judge and/or the policymaker should ask whether the relationship of the Claimant to the point of reference is comparable to the relationship of the Designated Beneficiaries to the same *good of reference*. Viewing the relationships in full context, the assessment should be pursued in two stages: (a) is the relationship of the Claimant to *the good of reference* comparable to the relationship of the Designated Beneficiaries to the same *good of reference*, in terms of their needs and the purpose of *the good of reference*? (b) if the needs based relationships are comparable, does the Claimant prove an arguable harm of unequal belonging in a democratic society? The suggested approach stands in opposition to a single, fixed, and abstract grounds approach which leads to a mirror-comparator approach.

75 Sheppard, *above* note 9, at 45 (citing Bliss v Canada (AG) [1979]1 S.C.R. 183 (Can.)).
76 *Id.* (citing Brooks v Canada Safeway Ltd [1989]1 S.C.R. 1219 (Can.)).
77 *Id.* (citing examples like Auton (Guardian ad litem of) v British Columbia (AG), 2004 SCC 78, [2004] 3 S.C.R. 657 (Can.) and Hodge v Canada (Minister of Human Resources Development),[2004] 3 S.C.R. 357 (Can.)).
78 *Id.* at 45.
79 *Id.* at 46.
80 *Id.*

iii. The Distinction of Inter- and Intra-Group Complaints of Unequal Belonging

Under the above considerations on the plural and dynamic nature of disadvantage and identity, it would be useful for the judge and the policymaker to pay attention to whether the claim relates to inter- or intra-group relations. To belong to a group of equals, it means that there is no oppression on any member of this group. This group may be either the larger society or a smaller, more specific group. Having "external protection" from the larger society to protect identity and culture or to ameliorate a disadvantage does not mean that the story of potential oppression has been resolved. Internal injustices and oppression can exist within an identity, social or cultural group as well. In a society where every member has an equal belonging, the judge and the policymaker should protect from oppression and unequal belonging, either this happens in the larger society or in a specific smaller community.

The above concerns are in line and very much influenced by Kymlicka's distinction of "external protection of minority groups" and "internal restrictions" within the groups and his skepticism over the latter. As I have already discussed in Chapter 4, as far as "the external protections," he stresses the conditions under which the external protections of minority groups are legitimate; "only in so far as they promote equality between the groups, by rectifying disadvantages or vulnerabilities suffered by the members of a particular group."[81] Thus, the minority rights as protection from the larger society are seen by Kymlicka as rights to reduce the minority group's vulnerability to the economic and political power of the majority.[82] He calls for compensating those born into endangered minority cultures and "insure the people against the costs of having to undergo cultural assimilation."[83] He calls for remedying the disadvantage caused by their unequal circumstances not related to their choices, but inherited by their race. He emphasizes that liberals can not accept rights which "enable one group to oppress or exploit other groups, as apartheid."[84] He argues that "liberals can and should endorse certain external protections, where they promote fairness between the groups[.]"[85]

"[I]nternal restrictions involve intra-group relations"[86] and Kymlicka stresses the danger of the internal oppression in the name of group solidarity.[87] As he explains, "ethnic or national group may seek the use of state power to restrict the liberty of its own members in the name of the group solidarity."[88]

81 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 52 (1995).
82 Will Kymlicka, *Politics in the Vernacular* 22–23 (2001).
83 Will Kymlicka, *Liberalism, Community, and Culture* 192 (1989).
84 Kymlicka, *above* note 81, at 152.
85 *Id.* at 37.
86 *Id.* at 36.
87 *Id.*
88 *Id.*

In the name of cultural tradition or "religious orthodoxy,"[89] individual rights of the members of a group may be restricted. As he states "they are often defended … as unavoidable by products of external protections, rather than as desirable in and of themselves."[90] But as he adds, "[t]he two kinds of claims need not go together."[91] Therefore, he finds that internal restrictions may oppress the individual freedom within the group and he argues that liberals "should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices."[92]

Kymlicka thus distinguishes "the internal restrictions" within the group from "the external protection of a group." While "[t]he first kind is intended to protect the group from destabilizing impact of internal dissent … the second is intended to protect the group from the impact of external decisions."[93] In other words, he suggests that there are two kinds of claims: "[t]he first involves the claim of a group against its own members; the second involves the claim of a group against the larger society."[94] While Kymlicka calls for the second, he is very skeptical about the first.[95] He therefore calls for both "equality between groups" and "freedom within groups."[96]

Kymlicka's distinction of "the internal restrictions" and "the external protection" of minorities and his suggestion that these two require different assessments may contribute to the analysis of *the right to equal belonging*. In particular, this distinction can contribute to the identification of the inter- and/or intra-group disadvantage the Claimant and the Designated Beneficiaries may have in the particular case. It would make easier for the judge and/or the policymaker to see that individuals who may be included in the Designated Beneficiaries of a program of external protection may still suffer from an unequal belonging and other injustices within their identity or other social group. The distinction may also reveal injustices regarding membership rules. Furthermore, the distinction can help in the substantive assessment of their *right to equal belonging*. First, the feeling of intergroup fairness and equality provides the security of freedom and then hopefully a situation of equal belonging in the society among the members of different equal groups. Second, the feeling of freedom within the group provides justice and individual freedom within the group providing thus an equal belonging in the larger society and the smaller community. Therefore, Kymlicka's distinction may inform the judge and assist in the proper assessment of the real disadvantage that the Claimant and the Designated Beneficiaries face. His distinction can

89 *Id.* at 36.
90 Kymlicka, *above* note 81, at 44.
91 *Id.* at 37.
92 *Id.*
93 *Id.* at 35.
94 *Id.* at 35.
95 *Id., e.g.*, at 35 and 37.
96 Kymlicka, *above* note 81, at 194.

give light to some of the different and various dynamics the legal assessment of *the right to equal belonging* may have in the inter- and intra-group contexts.

Other scholars have been concerned with internal group injustices. Sheppard sees that "special recognition to groups […] raises complex issues of group identity and representation." She wonders, "[h]ow we define group identity or identities?" and "Who is entitled to represent the group?"[97] She refers to scholarship on group representation and democracy and she reports their emphasis on "the risk of assuming individuals with a common group identity will necessarily expresses the same needs and interests[.]"[98] According to this scholarship, the reality is that "a distinction exists between the representation of groups and the representation of ideas or political perspectives."[99]

Young compares Kymlicka and Phillips, and she sees their worry about fake group homogeneity. In particular, in Young's understanding, Phillips and Kymlicka "worry that justifying groups representation in terms of experiences, interests, or opinions allegedly shared by all members of the group" has the following consequences: (a) "obscures differences within the group"; (b) "wrongly reduces all members of the group to a common essence," and (c) "thereby also divides groups so much from each other that understanding and co-operation across the differences may become impossible."[100] Young believes that "[i] ndividuals are better represented, furthermore, when representative bodies are plural, and when individuals have plural relationships to representatives, in both political and civic organizations."[101]

Guinier emphasizes the connection between choice, accountability and group identification, while pointing out that "racial groups are not monolithic, nor are they necessarily cohesive."[102] She says, "[w]hoever represents minority interests (just as whoever represent majority interests) should be directly, not merely virtually, accountable to those interests."[103] She thus finds that race in conjunction with geography is a useful, but limited proxy for defining the interests of those sharing a particular racial identity.[104] She goes on to

97 Sheppard, *above* note 9, at 125.
98 *Id.* (citing Anne Phillips, *Engendering Democracy* (2001)).
99 *Id.*
100 Young, *above* note 18, at 143 (comparing Kymlicka, *above* note 81, at 139; and Anne Phillips, *Politics of Presence* at ch. 2, 1995).
101 *Id.* at 143 (supporting that her theory of representation can respond to some of the concerns of other scholars, saying this after the above reference to Phillips and Kymlicka.)
102 Lani Guinier, *The Tyranny of the Majority, Fundamental Fairness of Representative America* 142 (1994).
103 *Id.* at 140.
104 *Id.* at 142. As she goes on to say, "[b]ut it is the assumption that a territorial district can accurately approximate a fixed racial-group identity – and not the assumption of a racial-group identity itself – that is problematic. Race-conscious districting – as opposed to racial group representation – may be rigidly essentialist, presumptuously isolating, or politically divisive. For example, different groups may share the same residential space but not he same racial identity.

distinguish a "macro-level" from a "micro-level" of control with the latter existing within the districts that the racial minority controls.[105] In the context of voting and political representation, Guinier regrets that race-conscious districting incorporates a static and monolithic view of representation.[106] Internal injustices may thus occur in the microcosm of the race-conscious district. In that way, Guinier is in line with and analogizes to Kymlicka's insights on minority rights and the distinction of an "external protection" from the "internal restrictions." Both see potential oppression on members of different groups as well as from members within the same group.

Kymlicka, Young, Sheppard, Phillips and Guinier all share, though in different ways, a concern about group internal injustices. Both the policymaker and the judge should see this distinction and apply it as instructed by their constitutional powers.

If one reflects on the above concerns in an effort to apply them on the claims against benefits, such as affirmative action programs, one can at least see a model of *four potential types of claims of unequal belonging*. We can identify a model of at least *four types of claims of unequal belonging* in the case of a benefit program or program or law of affirmative action. However, I should first introduce the reader to the most basic terminology in order to facilitate her/him to follow the categorization of the claims. (a) *Inter-group or Out Group Claimant* is defined as the Claimant who is challenging a program of affirmative action, arguing that she/he belongs to a different group, which is not among the Designated Beneficiaries; (b) *Intra-Group Claimant* is the Claimant who is challenging a program, arguing that she/he belongs to a group which is among the Designated Beneficiaries. The *Inter- or Intra-Group Claimant* can be an individual or a group or a sub group. Having this terminology in mind, the reader can now follow, while I continue presenting the four types of inter- and intra-group complaints of unequal belonging against a benefit program, such as an affirmative action program or law.

First, *the Inter- or Out Group Claimant* can challenge the program alleging that it violates equal belonging and asking the annulment of this program. A further distinction of this type of claim can be between the following subcategories of complaints: (a) the Claimant belongs to a more privileged group, or (b) the Claimant belongs to an allegedly equally or more disadvantaged group. I call these claims *External/Inter-Group Annulment Complaints of*

105 *Id.* (stating that "[t]he same assumptions about virtual representation that were the object of challenge at the macro level are now reproduced within subdistricts that the racial minority controls. The majority minority subdistricts operates on the same winner-take-all, majority rule principles. Even as an imperfect geometric 'fractal' of a larger jurisdiction-wide majority, it carries with it the assumptions of virtual representation to justify the minority group's domination.) *Id.* at 142–143. Furthermore, "[i]n this way, the assumption of 'minority district as independent identity' ignores issues of multiple, cross-cutting, and shifting differences." *Id.* at 146.

106 *Id.* at 145.

Unequal Belonging against a benefit program, such as an affirmative action program or law.

Second, *the Inter- or Out Group Claimant* can challenge the benefit and/or affirmative action program alleging that it violates equal belonging and asking the extension of the program to her/his group as well. It is likely that these Claimants would argue that their group face the same or even worse disadvantage as the Designated Beneficiaries. I call these claims *Inter-Group Under Inclusiveness Claims of Belonging* against a benefit program, such as an affirmative action program or law.[107]

Third, *the Intra-Group Claimant* can challenge the benefit and/or the affirmative action program, alleging that it violates equal belonging, and ask for the extension of the program to her/him as a member of the same group the Designated Beneficiaries belong to. What the Claimant challenges here is the definition of the Designated Beneficiaries. Such claims will more probably concern alleged injustices related to membership rules. I call this type of claim *Intra-Group Under Inclusiveness Membership Complaint of Belonging* against a benefit program, such as an affirmative action program or law.[108]

Fourth, *the Intra-Group Claimant*, whose membership in a group among the Designated Beneficiaries is not in dispute, may still challenge the benefit and/or the affirmative action program. She/he may allege that the program creates *intra-group unequal belonging*. In other words, this is an unequal belonging within a group of which the element is a member. I will call this claim *Intra-Group Unequal Belonging Complaint* against a benefit program, such as an affirmative action program or law.[109]

All of the above four types of complaints raise different issues, and a singular, generic, and fixed-grounds assessment cannot be accepted. If the judge and/or the policymaker did not try to see the different issues that had arisen in each of

107 *See also e.g.*, Adler v Ontario (AG),[1996] 3 S.C.R. 609 (Can.) (it was about the question of whether the denial of funding of independent religious private schools and the denial of funding of the health support services for handicapped children attending such schools in Ontario is a violation of the right to religion and the equality rights. While private denominational education is not publicly funded, Roman Catholic schools (which are protected by Section 93 of the Constitution Act, 1867) and public schools are publicly funded. Furthermore, school health support services are provided only to students in the public school system.)

As Iacobucci J. explains, "[t]he appellants are parents who, by reason of religious or conscientious beliefs, send their children to private religious schools. The first five appellants (the 'Adler appellants') are parents of children attending Jewish day schools. The 'Elgersma appellants' are four parents whose children attend independent Christian schools, and a non-profit corporation, the Ontario Alliance of Christian School Societies ('OACSS'), which is active in the promotion of Christian elementary and secondary education." *Id.* (explaining background, at para. 2)

108 Such was also the claim in *Cunningham*, 2011 SCC 37 and in Attorney General of Canada v. Lavell, [1974] S.C.R. 1349 (Can.). My reference here relates only to the type of complaint and it does not imply any agreement with the Claimants or the Defendants.

109 *e.g.*, Native Women's Assn of Canada v Canada, [1994] 3 S.C.R. 627 (Can.).

the above types of claims by Claimants and/or Potential Beneficiaries, the decision may confirm an inter- or intra-group disadvantage and injustice. In this book, I do not offer an in-depth theory for each of the above types of complaints. I offer the differentiation of the types of complaints and a model of analysis, calling for a nuanced approach for each type of complaint. A nuanced approach is necessary as different and special issues arise for each type of complaint. Categorizing the four types of complaints, I do not use the grounds of distinction in a formalistic way. Instead, I use the grounds of distinction as instrumental to contribute to the understanding of the inter- and/or intra- disadvantage at stake.

The above categorization of complaints against benefit programs and/or affirmative action programs has some support in the Canadian scholarship. Some Canadian scholars support the view that the reverse discrimination claims should be distinguished from the underinclusiveness claims against affirmative action programs. Sheppard has suggested the distinction between the reverse discrimination cases and the underinclusiveness cases since 1995.[110] In particular, Sheppard has suggested that we may distinguish the following types of the challenger(s) of affirmative action programs:[111]

a individual of the same group, supposed to be beneficiaries.
b individual of a disadvantaged group who is not a beneficiary of the program.
c individual of historical privileged group, who is not an intended beneficiary of the program.

Furthermore, immediately after *Kapp*, Canadian scholars began to rethink the appropriate analysis of section 15(2). Professors Jonnette Watson Hamilton and Jennifer Koshan have stressed the need to find the appropriate analysis of the relation of section 15(2) and underinclusive ameliorative programs.[112] After *Cunningham*, scholars saw more urgently the need to distinguish underinclusiveness from reverse discrimination claims.

More recently, Jena McGill has made a similar suggestion. Looking at the cases decided under section 15(2) from the Supreme Court of Canada, she proposes that the *Kapp* framework for section 15(2) is not the appropriate framework for claims like the one in *Cunnnigham*.[113] Motivated by the limits of the analysis in *Kapp* (when the Kapp model of analysis is applied in such claims like in *Cunningham*) she argues that a government law or program with ameliorative purpose is underinclusive or has discriminatory effects.[114] McGill also perceives that the *Kapp* framework may lead to results that are inconsistent with

110 Sheppard, *above* note 9.
111 *Id.*at 33–34.
112 Jena McGill, "Section 15(2), Ameliorative Programs and Proportionality Review," 63 S.C.L.R. (2D) 522 (2013) (reporting Jonnette Watson Hamilton and Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp" 47 Alta. L. Rev. 927 (2009–2010).
113 *Id.*at 522.
114 *Id.*

substantive equality in contexts beyond the reverse discrimination claims.[115] McGill thus proposes a distinction between underinclusive and discriminatory ameliorative programs.

McGill properly differentiates the claims in *Kapp* and *Cunningham*. She also correctly concludes that the *Kapp* approach may lead to injustices if it is applied generally to all cases involving ameliorative programs. When one looks at the facts and the claims of the two cases, one can see the difference. However the Court applied the same model of analysis to both cases. McGill, correctly in my opinion, suggested a distinction between complaints like *Kapp* and complaints like *Cunningham*. She, however, focuses on the nature of the program, instead of on the overall nature of the overall claim and the relation of the needs of the claimant to the program. Instead of distinguishing between "the reverse discrimination claims" and "underinclusiveness claims," she makes the distinction of "underinclusive ameliorative programs" and "discriminatory ameliorative programs." Furthermore, it is not clear whether she finds that the underinclusive programs are or can be discriminatory. Instead, I suggest that either "a reverse discrimination claim" or "an under inclusiveness claim" may reveal discriminatory programs and/or programs which in other ways demean equal belonging. It is a different issue whether a discrimination can be justified in a democratic society in the certain context.[116] I therefore, suggest a distinction of claims and, only after the analysis of the claims and only as a result of this analysis, we can move on a distinction of the programs.

What I find striking is the model of analysis followed by the Canadian Court. I see some different issues related to identity and intra-group relations needing to be analyzed in *Cunningham*. It may be however that the outcome of the decision would be the same even with a different approach. However, even if we make the distinction of inter- and intra-group challenges against a benefit and/or an affirmative action program, this does not mean that every inter group challenge will lead to the same analysis. The central criterion is to what extent the grounds of distinction each time indicate the disadvantage of unequal belonging. Not all the minorities face the same disadvantage. Kymlicka calls for a careful group categorization. As he says: "[w]e may need more precise categories that do a better job of tracking the patterns of prejudice, discrimination and disadvantage in society."[117]

115 *Id.*

116 This is discussed in the next chapter.

117 Will Kymlicka, 'Ethnocultural Diversity in a Liberal State: Making Sense of the Canadian Model(s)' in Volume III, *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (ed. Keith Banting, Thomas J. Courchene and F. Leslie Seidle) (2007) at 71. He goes on to say, "[p]ut another way, we need to pay more attention to the potential for increasing inequalities between different visible minorities as well as inequalities between visible minorities in general and White Canadians.

"In short, we have unfinished business with respect to equality for all groups, and further progress may require rethinking some of the categories used in these diversity silos." *Id.*

The central criterion for group categorization should always be the disadvantage of unequal belonging. For instance, race or religion as a ground of distinction will not always be suspicious for unequal belonging. This should be a result of the analysis of the type and degree of the disadvantage the groups face. Distinctions based on race will not have the same alerting function for all groups, as not all racial groups face the disadvantage of unequal belonging or at least, to the same extent. This is a traditional job for a policymaker to decide which groups face and to what extent the disadvantage of unequal belonging. But what about when the policymaker leaves the politically powerless people unprotected? Doesn't the judge remain the competent institution to protect their rights in a democratic society?

Concluding Comment

The reader can see the first concluding comment of this chapter in Section I. The first conclusion is that the grounds of distinction used in antidiscrimination provisions or equality guarantees in national and international human rights documents may have different forms. The grounds of distinction may be enumerated or analogous to the enumerated ones, singular or plural/multiple. The relevant grounds of distinction in the analysis of *the Right to Democratic Belonging* grounds are suggested to be the *grounds of unequal belonging*.

Second, I have commented on the function of the *grounds of unequal belonging*. It has been argued that the *grounds of unequal belonging* are contextual factors which are potential indicators of unequal belonging. They are relevant in the analysis of *the right to equal belonging*, only if they illustrate, in the specific context, vulnerability and disadvantage of unequal belonging.

However, to understand what the *grounds of unequal belonging* are, one needs first to understand what unequal belonging means. In positive terms, one needs to understand first what is the essence of *the right to equal belonging*. I have tried to explain this in the three previous chapters. I have suggested that *the right to equal belonging* has three inherent rights; *the right/s to secure and/or "free-identity" and/or minimum comfortable belonging in a community of equals*. The *grounds of unequal belonging* illustrate experiences of unequal belonging and they have an alerting function and trigger suspicions for the establishment of the prima facie violation of the *right to equal belonging*. This happens at least in one of the following three forms: (i) triggering suspicions for the violation of the *right to secure belonging in a community of equals*; (ii) triggering suspicions for the violation of the *right to* "free-identity" belonging *in a community of equals*, and (iii) triggering suspicions for the violation of the *right to minimum comfortable belonging in a community of equals*. Therefore, only *grounds of unequal belonging* have such an alerting function and they are relevant to the analysis of *the right to equal belonging*.

It has been suggested that the criterion of distinction should be analyzed and based on the needs of the Claimant and the Designated Beneficiaries and the purpose of the provided Benefit/*good of reference*. This criterion is revealed

after a comparison of *the two primary relationships*; (i) the relationship of the Claimant to *the good of reference* ("the relationship C[laimant] to the B[enefit]/good of reference"), and (ii) the relationship of the Designated Beneficiaries to the same good of reference ("the relationship D[esignated] B[eneficiary] to the B[enefit]/*good of reference*"). The basic question is how *the good of reference* responds to the needs of the Designated Beneficiaries and the needs of the Claimant *e.g.*, in the case of race conscious admissions programs in institutions of higher education, the ultimate *good of reference* is "higher education." To reach this same good, potential applicants in the institutions of higher education may have different needs to satisfy in order to reach the same good of higher education. The process of identifying the appropriate comparator can be illustrated in the following figures of *the two primary relationships*.

Figure 6.1 Relationship of *the good of reference* (GR) to Designated Beneficiaries (DB)

Figure 6.2 Relationship of *the good of reference* (GR) to Claimant(s) (C)

The above *two primary relationships* are the core of the whole analysis. They first need to be compared in terms of the needs of the Designated Beneficiaries and the needs of the Claimant. The basic question is the following: Can the needs of the Claimant be compared to the needs of the Designated Beneficiaries in respect of the same *good of reference*?

The third consequence of the argument is the suggestion that *the distinction between inter- and intra-group complaints of unequal belonging* seems to be useful in the analysis of the right. The *grounds of unequal belonging* contribute to the differentiation of the various complaints against benefits programs, like affirmative action programs. They also contribute to the understanding of the disadvantage at stake in the context of each challenge. I have then suggested *two types of inter-group complaints of unequal belonging* and *two types of intra-group complaints of unequal belonging*. I thus then distinguished the following claims: (a) *Inter-group Annulment Challenges of Unequal Belonging*; (b) *Inter-Group Under Inclusiveness Complaint of Unequal Belonging*; (c) *Intra-Group*

Under Inclusiveness Membership Complaint of Belonging, and (d) *Intra-group Unequal Belonging Complaint*. The suggested consequences can only be seen, if the reader has first accepted the argument in Section I.

The explanations of the nature and the function of *the grounds of unequal belonging* brings us to the end of Part II of this book. Part II has been the main part of the book and it was devoted to the definition of the essence of *the right to equal belonging*. In Chapters 3–5, I have argued for three inherent rights in *the right to equal belonging*. In Chapter 3 I have argued for the *right to secure belonging in a community of equals*. In Chapter 4, I have argued for the *right to* "free-identity" belonging *in a community of equals*. In Chapter 5, I have argued for the *right to minimum comfortable belonging in a community of equals*, as a by product of the two first rights. In Chapter 6, I have argued about the role of the grounds of distinction in the legal analysis of *the right to equal belonging*. The analysis of the grounds of distinction is a part of the substantive analysis of the right, only if they constitute *grounds of unequal belonging*. These are grounds which indicate experiences of vulnerability and disadvantage which create suspicions for violation of, at least, one of the three inherent rights of *the right to equal belonging*. The substantive, purposive and contextual interpretation of the *Right to Equal Belonging in a Democratic Society* requires identification of the disadvantage of the unequal belonging within a little group as well as within the larger society. These potential disadvantages indicate both the disadvantage of *Inter- and Intra-Group Unequal Belonging*.

Only after we define and analyze the scope of the right, we can assess the restrictions of the rights. In particular, only then we can analyze "whether a certain restriction of *the Right to Democratic Belonging* can be considered to be a reasonable limit in a democratic society." In other words, this question is "whether the restrictions and limits certain prima facie violation of *the Right to Democratic Belonging* can be justified in a democratic society" as the next stage of legal analysis. As already pointed out this is an analysis which falls out of the scope of this book as it is about a general theory of justification of the limits of the rights in a democratic society. Instead, this book aims to define specifically the scope of the *Right to Equal Belonging in a Democratic Society*. However, the reader finds the theoretical background of what a democratic society is in Chapter 2. This background is required for both the two main analytical pillars – both for the pillar over the analysis of the scope of the right and the pillar over whether the limits of the right are reasonable in a democratic society. The reader will also find in Chapter 7 what the minimum content of the ultimate *Right to Equal Belonging in a Democratic Society* is. Violation of this minimum threshold of protection will mean certainly a violation of the ultimate *Right to Equal Belonging in a Democratic Society*.

By this time of the analysis, the reader may seek some more clarifications for the terminology I use for "the right" in the different analytical stages. Indeed, I have so far used different terms referring to the "right" at stake; the right to equal belonging; the Right to Democratic Belonging, the rights to (1) secure,

(2) "free-identity" and (3) minimum comfortable belonging in a community of equals. What is the exact relationship of all these rights? The general innate or inherent right of the *Right to Democratic Belonging* is the right to equal belonging. "The ultimate right" is the Right to Democratic Belonging, or in other words the Right to Equal Belonging in a Democratic Society. The right to equal belonging has three inherent rights; the rights to (1) secure, (2) "*free-identity*" and (3) minimum comfortable belonging in a community of equals. A violation of the right to equal belonging does not however certainly mean a violation of the Right to Democratic Belonging. The violation of at least one of the three inherent rights in the right to equal belonging establishes a violation of the right to equal belonging. A violation of the right to equal belonging establishes only the prima facie violation of the Right to Democratic Belonging. To conclude whether the prima facie violation of the *Right to Democratic Belonging* constitutes a violation of this right, it takes an analysis over whether this prima facie violation is justified in a democratic society. This means that a *violation of the right to equal belonging* is at the same time *a prima facie violation of the Right to Democratic Belonging*. However, it remains to be seen during a justification analysis whether the prima facie violation constitutes also a *violation of the Right to Democratic Belonging*.

Part III

Justification

Once, the prima facie violation of the right is established, the next main general question is whether the limits of the rights are justified in a democratic society. Part III deals with the analysis over the justification of the limits of the right. However, the analysis here is restricted in identifying only one among more questions probably required for the full analysis of this stage. Here, I identify both the main general question of the justification analysis, and I develop one key more specific question within this suggested analysis. I here suggest and develop the criterion of the *minimum content of the right* which is a more specific question within the more general justification analysis.

7 The Minimum Content of the Right to Equal Belonging in a Democratic Society

Introduction

In this chapter, I define the minimum content of the ultimate *Right to Equal Belonging in a Democratic Society*. The minimum content of the right has implicitly allowed the definition of the scope of the right. The definition of the scope of the right has built on and expanded the minimum content of the right. The agreement of what is the minimum content of the right serves an additional function in the analysis of the right as an element of the analysis over whether the limits and restrictions of the right in a certain case are justified in a democratic society. This is an analytical pillar after the initial analysis of the scope of the right. The identification of the minimum content of the right serves this second analytical pillar as following: violation of this minimum threshold of protection will certainly mean a violation of the ultimate *Right to Equal Belonging in a Democratic Society*. What follows is an identification of a crucial criterion of the analysis of both the scope of the right and the analysis over the justification of the limits of the *Right to Equal Belonging in a Democratic Society*.

For the right to be protected, any proportionality test or any other alternative test or justification should consider the threshold set by the *minimum content of the Right to Equal Belonging in a Democratic Society*. I find that the *minimum content of the Right to Equal Belonging in a Democratic Society* is the *right to self rule and self development, in the sense of non dominance*. Any further inquiry over whether the limits of the rights are reasonable in a democratic society should take place above the threshold of the protection the minimum content of the rights sets. The definition of the right in Chapters 3–5 has built on the minimum content of the right. The inherent rights to a secure, "free-identity" and minimum comfortable belonging are the expansive version of the minimum content of the *Right to Equal Belonging in a Democratic Society*. If the rights are restricted more than as provided by the minimum content, then they are certainly violated. Thus, the minimum content of the right is the implied starting point of the analysis of the scope of the right as well as the explicit minimum threshold of protection of the right in the justification analysis.

If the minimum content of the right is not violated, then it may still be a violation of the right. To answer this, there should be an inquiry over questions

of modesty or fairness or proportionality of the limits of the rights. This justification is an inquiry of whether the restrictions of the right are reasonable limits in a democratic society and a theory of proportionality or modesty or fairness or other alternative test for the judge or the policymaker. This inquiry takes place above the threshold of protection set by the minimum content of the right. However, I leave out of the scope of this book the task of proposing a general model of analysis of this inquiry. The purpose of this section is only to define the minimum content of the *Right to Equal Belonging in a Democratic Society.*

I. The Minimum Content of the Right to Equal Belonging in a Democratic Society: General Remarks

If the *minimum content of the right* is violated, then, one needs to acknowledge violation of the right. In other words, below the threshold of protection set by *the minimum content of the right*, any impairment of the right constitutes a violation of the right. Even in this last case, it is however a different issue whether the established violation of the right is in the end constitutional or not. Normally it is not. However, such violation could be constitutional in some exceptional cases of constitutional emergency.[1]

The idea of a *minimum content of the right* is reminiscent of "the idea of the core of the rights." The idea of the core of the right is very well known at least to European and certainly to German lawyers, judges and scholars. Article 19 of the German Constitution is about the "restriction of the right," stating in section 2: "*(2) In no case may the essence of a basic right be infringed.*"[2] What I mean by "the minimum content of the right" is indeed "the essence of the right." German and Greek lawyers, judges and scholars also know well a very relevant condition to the prohibition of the violation of the essence of the right provision. This is the prohibition of the violation of the right to human dignity. Article 1 of the German Constitution provides:

> Article 1 [Human Dignity]
>
> (1) Human dignity is inviolable. To respect and protect it is the duty of all state authority.
>
> (2) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world.
>
> (3) The following basic rights are binding on legislature, executive, and judiciary as directly valid law.[3]

1 The question of when a violation of the right can be constitutional does not fall within the scope of this book.

2 Grundgesetz für die Bundesrepublic Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBI.I 19(2) (Ger.).

3 *Id.* at 1.

Article 2 (1) of the Constitution of Greece provides:

> (1)Respect and protection of the value of the human being constitute the primary obligations of the State.[4]

The right to dignity is a conceptual guideline for all the human rights. The Preamble of the Universal Declaration of Human Rights, 1947 reminds us:

> Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

However, human dignity is a vague legal tool. It is hard to trace and define it. Thus, it is equally difficult to litigate and make policy over human dignity. To find what the core of the right is to wonder what the absolute minimum standard that one can restrict the right in a democratic society is and still remain within the absolute minimum scope of the right. But for litigation and policy-making, we need somewhat more "tangible" legal tools. Otherwise, even the most sacred values can be abused when they are vague.

But what is then *the minimum scope of the Right to Democratic Belonging* which cannot be violated in a democratic society and can be used as a legal tool in litigation and policy making? I suggest that the minimum scope of the *Right to Democratic Belonging* is the right to self rule, self development and self identification in the sense of non-dominance. Whether this dominance is political, economical, social and/or emotional in a public relationship, *the right to non-dominance* is always the core of *the Right to Democratic Belonging*. Putting it in positive terms and specifying the above, I offer a useful legal tool. I have identified the following important contextual factor indicating violation of *the minimum content of the Right to Democratic Belonging*: a perpetuation or worsening of a pre-existing disadvantage or whatever other disadvantage threatens the power to self rule, self development and self identification. To put it negatively, this is the right to non-dominance in terms of belonging. The minimum equal belonging in a democratic society is the right to belong in such a society with the freedom to rule oneself in all levels of a public relationship without being dominated.

Above this level of protection, set by the minimum content of the right, we may then debate about how and whether some other kinds of inequalities affect the equal belonging in a democratic society in specific cases. Therefore, the perpetuation, and even more, the worsening, of a pre-existing disadvantage which threatens the power for self development and self identification are the contextual factors which indicate violation of *the minimum content of the Right to Democratic Belonging*. Recall my references to the American scholars who understood the equal protection of the laws as an anti-subordination

4 1975 Syntagma [Syn.] [constitution] as it has been amended 2.1. (Greece)

principle.[5] These are some scholars, who have advocated for a prohibition of disadvantaging minorities in such a way as to create a risk of their subordination and dominance. This is what I mean with the factor of perpetuation of a pre-existing disadvantage which creates the risk of dominance.

II. The Minimum Content of the Right to Equal Belonging in a Democratic Society and the Inherent Rights

This *minimum content of the right*, in the sense of non-dominance is the core of the three inherent rights in the more general *right to equal belonging: the rights to secure, "free-identity" and minimum comfortable belonging in a community of equals.* In particular, the core of *the right to secure belonging in a community of equals* is the right not to be dominated by others, either in the form of such prejudice, stereotype, perpetuation and/or worsening of a pre-existing disadvantage and/or in another way of oppression which leads to a danger of being dominated by other people. It seems that the most alerting element of *the right to secure belonging in a community of equals* is the prohibition of the perpetuation and/or worsening of a pre-existing disadvantage. The perpetuation and/or worsening of a pre-existing disadvantage creates the biggest danger of domination. The danger increases depending on the nature and extent of the pre-existing disadvantage and the nature and extent of the additional harm. It seems that the prohibition of the perpetuation and/or worsening of the pre-existing disadvantage which leads to social, economic and/or political dominance is the heart of the violation of *the minimum content of the right to secure belonging in a community of equals.*

Second, *the right to non-dominance* is also the core of *the right to "free-identity" belonging in community of equals.* In particular, the core of this right is violated if one is dominated by others in terms of his/her identity. This is the case of an identity oppression which demeans one's freedom to be true to oneself. This can happen at least in the following forms: (a) if one is not allowed to be identity immersed, or distinct, but also integrated in the larger society in such a way which creates a risk of domination; and/or (b) if one is not allowed to be exempted from generally applicable laws and regulations, while compliance with such laws and regulations causes dominance regarding identity, or (c) if the denial of self-government rights creates the risk of intergroup dominance. Identity dominance is therefore the core of the violation of *the right to* "free-identity" belonging *in a community of equals.* There should not be a single model of intergration and everyone deserves self-ruling in terms of identity.

Third, *the right to non-dominance* is the core of *the right to minimum comfortable belonging in a community of equals.* If one is emotionally dominated by others in terms of anxiety through [identity] oppression, one cannot rule

5 Chapter 1 (reporting references by Reva B. Siegel, "Equality Talk: Anti-subordination and Anticlassifcation Values in Constitutional Struggles over *Brown*", 117 Harv. L. Rev. 1470, 1473, n. 8 (2003–2004).

oneself. One acts under this anxiety created by the oppression or the threat of oppression. Under such conditions, one does not act upon one's own will; one is not free to rule oneself. Emotional dominance in a public relationship which arises from the violation of *the rights to secure and/or identity free belonging in a community of equals* is therefore *the minimum content of the right to minimum comfortable belonging to a community of equals.*

What it has been suggested is that below the threshold of protection *the right to non dominanc*e sets the *Right to Equal Belonging in a Democratic Society* to be certainly and always violated. However, the reverse is not true. There are cases that the core of the right is not violated, but the right is violated. The principle of "modesty" in the words of Montesquieu or the principle of "proportionality" in a more popular term sets additional standards stemming from the very meaning of justice in a democratic society for determining when there is violation of the right. I suggest that any proportionality/modesty test between the significance of the legislative aim and the impairment of the right should take place above the threshold of *the minimum content of the Right to Democratic Belonging*. As it has been already suggested, the violation of *the minimum content of the right* is composed of the following criteria: (a) social, economic and/or political dominance; and/or (b) identity dominance; and/or (c) emotional dominance stem from insecure/unsafe belonging and/or such membership which threatens or oppresses identity freedom of a member to the group of reference.

Concluding Comment

The purpose of this chapter has been to identify the minimum content of *the Right to Democratic Belonging*. Below the threshold of protection set by this minimum content of the right, any restrictions of the right constitute violation of the right. Therefore, a violation of the right to self development, self rule, non-dominance, freedom to personal conscience can not be tolerated in a democratic society, at least when it operates in non-emergency constitutional times. The theoretical insights in Chapter 2 of what a democratic society means and the insights in Chapters 3–5 on the scope of the *Right to Democratic Belonging* have served as the essential theoretical background for my suggestion in this Chapter. In this chapter, I have suggested one of the criteria, which falls within a larger and more comprehensive theory of justification of the limits of the rights in a democratic society. We still, I think, need to develop a more comprehensive theory. I suggest that below the threshold of the protection the minimum content of the right sets, there is certainly a violation of the right. However, a violation of the right can be established even if the minimum content of the right is not violated. This would be the case of a restriction of the right which does not pass a kind of a proportionality test. However, I don't offer here a suggestion of a new proportionality test or of any kind of proportionality or justification test. At least, it should be a test which reviews that the restriction of the right is modest in relation to the goal to be achieved and

that this assessment is situated in the democratic society. To sum up, the criterion of the minimum content of the right is only one criterion of a more comprehensive theory of when the limits of the rights are justified in a democratic society. The minimum content of the *Right to Democratic Belonging* is however specific to this certain right. I have provided in this chapter the minimum content of the *Right to Democratic Belonging* which serves the analysis of the justification of the restrictions of the certain right in a democratic society. It has also served as an implied theoretical premise and starting point for building the theory of the inherent rights suggested in Chapters 3–5.

Part IV

Conclusions

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8 Conclusions on the General Theory

I. The *Right to Democratic Belonging* and Its Inherent Rights

The ultimate right I have suggested is *the Right to Equal Belonging to a Democratic Society*. In other words, it is *the Right to Democratic Belonging*. The minimum core of this right is *the right to self rule, self identification and self development, in the sense of non-dominance*. *The right to equal belonging* or *the right to belong in a community of equals* is an inherent right in the ultimate right: *the Right to Equal Belonging in a Democratic Society* or, in other words, *the Right to Democratic Belonging*. I have defined democratic society as follows: (a) participatory, (b) community and (c) among equals. "Community of equals" means "community of people of equal worth in their membership." Therefore, in "a community of equals," there are no relationships with a hierarchy of worth or relationships of dominance.

The right to equal belonging has been defined as one which includes three inherent rights: (a) *the right to secure belonging in a community of equals*; (b) *the right to* "free-identity" belonging *in a community of equals*, and (c) *the right to minimum comfortable belonging in a community of equals*. *The right to comfortable belonging* is "minimum" in the sense that it is the by product of each of the two previous inherent rights in *the right to equal belonging*. *The right to minimum comfortable belonging in a community of equals* indicates, therefore, the comfort from enjoying *the rights to secure and/or* "free-identity" belonging *in a community of equals*. Therefore, while *the right to equal belonging* has three inherent rights, it is itself an inherent right in *the Right to Democratic Belonging*.

II. The Two Primary Relationships

The core of the analysis of *the Theory of the Right to Democratic Belonging* is based on *two primary relationships*: (i) the relationship of the needs of the Designated Beneficiaries to *the good of reference* and (ii) the relationship of the needs of the Claimant[s] to the same *good of reference*. The *good of reference* is illustrated by the long-term purpose of the legislation (for example, a race conscious affirmative action admissions program in a college aims to provide

the good of higher education to all, having thus a remedial purpose of a historic inequality). The central question is: how does the *good of reference* (GR) respond to the needs of the Designated Beneficiary (DB) and those of the Claimant[s] (C) and how accessible is *the good of reference* to the Designated Beneficiary (DB) and the Claimant(C)?

These *two primary relationships* need to be understood and then be compared in a substantive, contextual and relational way in terms of the needs of the Designated Beneficiaries and the Claimant[s]. The central question can be articulated therefore as follows: Can the needs of the Claimant be compared to the needs of the Designated Beneficiaries in respect of the same *good of reference*? It is then a second central question whether this comparison shows such a kind of inequality, if any, which constitutes [an arguable] unequal belonging. It is also necessary to compare *the two primary relationships* before and after the enactment of the impugned policy/legislation, which provides an immediate benefit, which needs to be understood purposively as *the good of reference* (GR). The central question upon which the whole analysis builds is therefore the following: Can the needs of the Claimant be compared to the needs of the Designated Beneficiaries in respect of the same *good of reference*, and does this comparison result to the violation of *the Right to Democratic Belonging*?

Thus, the whole analysis is based on the analysis of *the two primary relationships* and it is a needs-based, relational and purposive inquiry. It is necessary to compare *the two primary relationships*, as they stand before and after the enactment of the impugned policy/legislation. Therefore, it is necessary to understand both *the two primary pre-existing relationships*, as well as, *the two primary relationships, after the enactment of the impugned legislation*.

Ending this book, I will provide a schematic illustration of my main conclusions on the nature of *the Right to Democratic Belonging* and its inherent rights.

III. Schematic Illustration of the Theory of the Right to Democratic Belonging

i. The Two Primary Relationships

(a) The Relationship Between the Designated Beneficiary and the Good of Reference: (R DB-GR)

One of the *two primary relationships* is the relationship between the needs of the Designated Beneficiary (DB) and the *good of reference* (GR). The question is how accessible is the *good of reference* to the Designated Beneficiaries in terms of their needs or how does *the good of reference* respond to the needs of the Designated Beneficiaries? For example, how accessible is higher education for Native Canadians or African Americans and/or from a low- or high-income family?

This relationship can be understood in terms of distance to access the *good of reference*. This distance is understood in a substantive, contextual, needs-based

and relational way. In particular, the distance is based on the needs of the Designated Beneficiary and it is based upon a substantive, contextual and purposive analysis of the provided Benefit. Then, the whole analysis looks at the relation between the needs of the Designated Beneficiaries and the *good of reference*. In other words, it refers to the relationship of the Designated Beneficiaries to the *Good of Reference*, understood in a substantive, contextual and purposive and relational way. Therefore, the unit of length of distance is not measured by a traditional measure. Rather, the length of distance is the result of the assessment of ideally all the substantive and contextual factors which are part of the relationship of the needs of the Designated Beneficiaries and *the good of reference*.

For the purposes of the schematic illustration of the theory, this relationship can be drawn as follows:

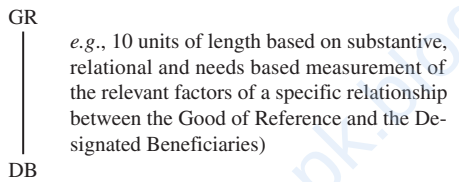

Figure 8.1 Preexisting Relationship DB to GR (R DB–GR)

(b) The Relationship Between the Claimant and the Good of Reference: (R C–GR)

The other of *the two primary relationships* to understand is the relationship between the needs of the Claimant and the provided *Good of Reference* (GR). The question is how accessible is the *Good of Reference* to the Claimant, in terms of the Claimant's needs? Or how does the *good of reference* respond to the needs of the Claimant? For example, how accessible is higher education for the Claimant who is Caucasian in her/his race or a girl from a low or high-income family?

This distance is understood in a substantive, contextual, needs-based and relational way. In particular, the distance is based on the needs of the Claimant and it is based upon a substantive, contextual and purposive analysis of the provided Benefit. Then this analysis looks at the relation between the needs of the Claimant and the *Good of Reference*. In other words, it refers to the relationship of the Claimant to the *Good of Reference*, understood in a substantive, contextual, and purposive and relational way. Therefore, the unit of length in the metric system is not a traditional numerical unit. The unit is a result of the assessment of various substantive and contextual factors which are parts of the relationship of the needs of the Claimant and the *Good of Reference*.

For the purposes of the schematic illustration of the theory, this relationship can be drawn as follows:

GR
|
C

e.g., 5 units of length based on substantive, relational and needs based measurement of the relevant factors of a specific C relationship between the Good of Reference and the Claimant)

Figure 8.2 Preexisting Relationship C to GR (R C-GR)

(c) The Relationship of the Two Primary Relationships, Before and After (RR C–GR, R DB–GR, R C–DB)

Third, once we understand the above *two primary relationships* and the accessibility of the same *Good of Reference* to both of the Designated Beneficiaries and the Claimant, we need to proceed to the first attempt to compare *the two primary relationships*. Having analyzed the real accessibility of the Designated Beneficiaries and the Claimant to the same *Good of Reference*, we can now compare these relationships. We need to observe whether there is inequality in their accessibility to the *Good of Reference*.

For instance, we may observe that the levels of accessibility of the *Good of Reference* the Designated Beneficiaries enjoy are lower than those of the accessibility of the same *Good of Reference* the Claimant enjoys. In this case, there is inequality in their relationships, as far as the *Good of Reference* is concerned.

Combining now the above relationships shown in Figures 8.1 and 8.2 in the schematic illustration of the theory, we can observe a non isosceles triangle.

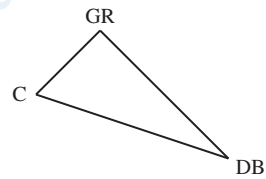

Figure 8.3 Relationship of *the two primary pre-existing relationships* – pre-existing inequality (RR C–GR, R DB–GR, R DB–C)

Now, the analysis should continue taking into account the immediate benefit provided by the impugned policy. We need again to understand the two primary relationships as they stand after the enactment of the impugned policy in a substantive, contextual, and purposive and relational way, *e.g.*, how do they stand after the positive contribution of the race criterion in the admissions in the college for the Designated Beneficiaries? The analysis now continues, but it refers to the primary relationships, as they stand in the era after the enactment of the impugned legislation. The question is now, how the provided

benefit arguably influences the primary pre-existing relationships, or in other words, how the primary relationships stand after the enactment of the impugned policy/legislation.

As far as the relationship of the Designated Beneficiary and the *good of reference*, in terms of their needs, the question is the following: how does the provided benefit aim to influence this relationship? *e.g.*, how does the race conscious affirmative action program aim to improve the accessibility of the good of higher education the Designated Beneficiaries enjoy? The relationship between the Designated Beneficiary and the *Good of Reference*, as it stands, or as it is intended to stand, after the enactment of the impugned policy, may be illustrated as follows:

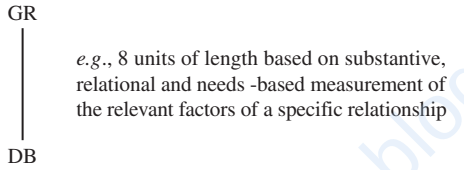

Figure 8.4 The relationship between the DB and GR (R DB–GR) as it stands or it is intended to stand after the enactment of the impugned legislation

As far as the needs-based relationship of the Claimant and the *Good of Reference*, the question is the same as above: how does the provided benefit aim to influence this relationship? For example, the program aims to improve the accessibility of the good of higher education the Designated Beneficiaries enjoy and it may have an impact on the accessibility of the same good to the Claimant. The relationship between the *Good of Reference* and the needs of the Claimant, as it stands or as it is intended to stand, after the enactment of the impugned legislation may be illustrated as follows:

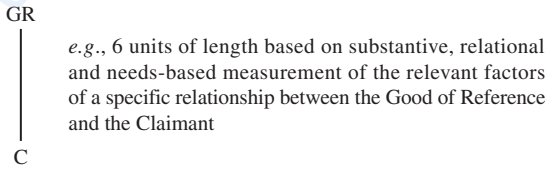

Figure 8.5 The relationship of C to GR (R C–GR) as it stands or it is intended to stand after the enactment of the impugned legislation

Combining now the above relationships in the schematic illustration of the theory we can observe a non isosceles triangle. The difference from the previous triangle is that this post-enactment of the impugned policy triangle is in the process of becoming more like an isosceles triangle.

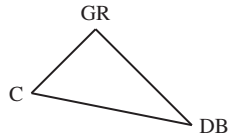

Figure 8.6 The relationship of *the two primary relationships* as they stand, or as it is intended to stand, after the enactment of the impugned policy – aimed reduction/remedy of inequality (RR–GR, R DB–GR, R DB–C)

Looking now at the triangles in Figure 8.3 and Figure 8.6, one can observe how the three distances of the three involved relationships illustrated in the triangles, corresponding the sides of the triangle (GR–DB, GR–C, DB–C) are or are intended to be affected after the impugned policy/legislation. The three relationships are (i) GR–DB; (ii) GR–C; and (iii) DB–C. Figure 8.6 illustrates the following real or intended change in the distance of these relationships, corresponding to the sides of the triangle: (i) GR–DB is reduced; (ii) GR–C is increased; and (iii) DB–C is reduced.

The above relationships indicated in Figure 8.6 present the relationship of the needs of the Designated Beneficiaries and the Claimant and/or Potential Beneficiary in respect of the same *Good of Reference* after the provided Benefit by the impugned legislation. This is the real or intended relationship of the *two primary relationships* in terms of equal belonging after the enactment of the impugned legislation. If the provided benefit can respond to the needs of the Claimant, the non-provision of the benefit to the Claimant creates inequality. However, this is an inequality perhaps only in the relationship of GR–C before and after the impugned legislation, *e.g.*, the distance of the Claimant to *the Good of Reference* becomes longer than it was before the enactment of the policy. It extends one unit of length based on substantive, relational and needs-based measurement of the relevant factors in a specific relationship. However this one unit of length based on a substantive, relational and needs-based measurement of the relevant factors in a specific relationship should be understood as a whole distance of six units. This latter distance of six units of length in the metric system based on substantive, relational, and needs-based measurement of the relevant factors in a specific relationship will be compared to the aimed distance of the Designated Beneficiaries to *the Good of Reference*. This is, in our example, a distance of eight units. Still there is an overall inequality against the Designated Beneficiaries. The Claimants still stand closer to *the Good of Reference* rather than the Designated Beneficiaries. Even if the policy was more radical trying to equalize the two distances, *e.g.,* seven to seven units of length based on a substantive, relational and needs-based measurement of the relevant factors in a specific relationship, the program would be seen as trying to achieve equality. The more the triangle aims to become an isosceles triangle, the more equality the policy tries to achieve.

(d) A Limitation

There is a limitation of the above understanding of *the two primary relationships* before and after the impugned legislation/policy in terms of distance. How can one estimate this distance? How can you say that a distance in the relationship between the Designated Beneficiary or the Claimant to the same *Good of Reference* is 6 or 8 or 10 units based on substantive, relational and needs-based measurement of the relevant factors in a specific relationship? How can you say that the impugned legislation aims to reduce this distance one unit or more? Is this a numerical understanding of people and their relationships? The question remains: how you, as a judge or a policymaker, are going to estimate the distances? I could perhaps argue that it is the parties and the people their interests are involved in by the legislation at stake who are going to argue and talk over this relative distance. Certainly, there is more to discover whether a unit of length can be based on substantive, relational and needs-based measurement of the relevant factors in a specific relationship.

I illustrate my relational and substantive approach with numbers and distances in an effort to illustrate schematically the inequality which I understand in a relational, contextual and substantive way. In many contexts, we understand relationships in terms of relative distance too, while we assess them in a substantive way. For example, what do we mean when we say that "I have a closer relationship to this person rather than to the other person"? Rather than simply analyzing relationships in numerical terms, in reality I try to illustrate that we feel far away from a relationship where we do not belong and we feel closer to a relationship that we belong in. In other words, I illustrate that we feel more remote to others in a relationship where we do not belong as equals to the other participants of this relationship. If even with above explanations, one still finds difficulty to accept my schematic illustration with distances, one can keep in mind both the benefits of this schematic illustration of the conception of equality with distances, as well as, its drawbacks. I will now offer my conclusions on the nature of *the Right to Democratic Belonging* and its inherent rights, as I have understood it through concentric circles.

ii. The Right to Democratic Belonging *and its Inherent Rights Explained in Concentric Circles*

I will suggest now a figure of concentric circles which illustrates the definition of *the Right to Democratic Belonging*. It is composed of three main concentric circles. I will explain these circles first separately. I start my explanations from the most innate circle, and I move to the outer concentric circles. Look now at the following figure:

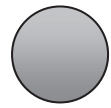

Figure 8.7 Inner concentric circle

Figure 8.7 is the innate circle. This is the core, or in other words, *the minimum content of the Right to Democratic Belonging: the right to self rule, self development and self identification, in the sense of non dominance.*

Look now at the Figure 8.8:

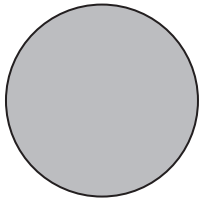

Figure 8.8 Intermediate concentric circle

illustrates *the right to equal belonging*. It is a larger circle than the one in Figure 8.8. Its radius is longer. Consequently, the diameter of the circle in Figure 8.8 is longer than the one in Figure 8.7. It illustrates the first main analytical pillar over the analysis of the scope of *the Right to Democratic Belonging*. This larger circle includes the three inherent rights in the *right to equal belonging: the rights to secure and/or "free-identity" and/or minimum comfortable belonging in a community of equals.*

Look now at the following figure:

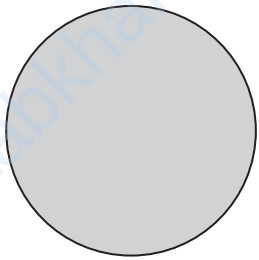

Figure 8.9 Outer concentric circle

illustrates the ultimate right: *the Right to Equal Belonging in a Democratic Society* or in other words, *the Right to Democratic Belonging*. This is a bigger circle than the intermediate one. It has a longer radius and consequently diameter and bigger surface. This largest circle includes the second analytical pillar, that is the "justification zone." I haven't offered a theory for the justification zone but I have suggested that it aims at answering whether the limits of the right are justified in a democratic society.

Figure 8.7 is included in all three concentric circles. It is *the minimum content of the Right to Democratic Belonging*. Because the minimum content is the core right, the circles are concentric. The three circles can be understood as gradually larger than each other because they gradually involve more relationships to more people.

It is not the first time that a lawyer has explained a right through concentric circles. Professor Nikos Alivizatos has explained the jurisprudence of the Court

of Human Rights over the right to religion through concentric circles. He sees that, according to this jurisprudence, the inner aspects of the right to religion cannot be restricted at all. He finds however that some other aspects falling in the outer concentric circles may be restricted in a democratic society.[1] His explanations have served as some kind of confirmation of my understanding of *the Right to Democratic Belonging* through concentric circles. They have also contributed in my effort to understand an order in the relation among the inherent rights in *the Right to Democratic Belonging*.

Putting these main concentric circles[2] together, the figure becomes as follows:

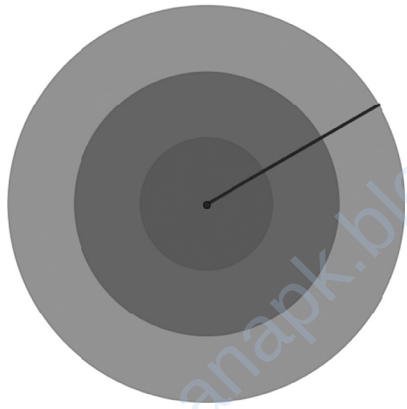

Figure 8.10 Concentric circles

IV. Final Thoughts on the General Theory

Readers from Greece and Cyprus may find my approach new, but not very far from responding to challenges they already face in their constitutional realities. Readers from Greece may wonder what *the Right to Democratic Belonging* means in their current reality with newcomers from Member States of the European Union or naturalized new citizens of Greece. At least the participants in the programs which aim at the improvement of academic performance and the integration of Muslim Greeks may have already realized that the way we belong in a group matters for the extent to which we feel ourselves to be

1 Nikos K. Alivizatos, Metaxy koinotismou kai isotitas i gia to dikaioma sti thriskeutiki eleutheria gia tis thriskeutikes meionotites [*Between Communitarianism and Equality or about the Religious Freedom of the Religious Minorities*], *in* To anolomologito ton meinotiton stin elliniki ennomi taxi. [The Non-Admitted Issue of the Minorities in the Greek Legal Order] 191, 197 (Dimitrios Christopoulos ed., 2008).

2 Each of the three main concentric circles may include even more concentric circles. However, this statement requires an analysis of the theory of the Right to Democratic Belonging in a more advanced level, rather than the introduction of the theory this book aims to offer.

equal members of it. They may have already seen that to feel equal members in a group means to belong as equal in this group. Psychologists, sociologists, anthropologists and educators working at the Program of Education of Muslim Children (PEM) may have seen myriad ways that the equal belonging in their classrooms matters in order to see the children flourish and develop their potentials. They may have seen that to be equal in a group means to have equal membership and that is to have at least equally secure, "free-identity" and minimum comfortable belonging in the larger society and other microsocieties like classrooms, schools and universities. It remains to be seen, if Muslim Greeks will ever feel that they have an "equally secure, 'free-identity' and minimum comfortable belonging" in Greece, both in society as a whole and micro societies like the institutions of [higher] education. Will the little children I met in March of 2012 in Mikrohori (Little-village) [Μικροχώρι] ever have this experience in their country? It also remains to be seen if the judges and policymakers in Greece will understand their role as protecting *the Right to Democratic Belonging* in their society and other micro societies, like institutions of higher education.

Readers from Cyprus may reflect on what *the Right to Democratic Belonging* can mean for their society. What does *the Right to Democratic Belonging* mean in their current reality with newcomers from Member States of the European Union or naturalized new citizens? What does *the Right to Democratic Belonging* mean if their country is reunified and Greek and Turk Cypriots live together? It remains to be seen whether Cypriots will ever live in a country where every citizen will have *an equally secure, "free-identity" and minimum comfortable belonging in a democratic society* of a reunified Cyprus and its democratic universities. Will the judges and policymakers in Cyprus ever understand their role as protecting *the Right to Democratic Belonging* in their society and other micro societies, like institutions of higher education?

It remains to be seen if judges and policymakers in Canada and the United States will understand their role as protecting *the Right to Democratic Belonging* in larger society and other micro societies, like the institutions of higher education. Scholars in Canada and the United States consistently understood the right to equal protection of the laws as protecting from subordination.[3] It is noteworthy that Kymlicka has considered the idea of belonging within the notion of equal citizenship.[4] Greschner has suggested that "the equality provisions in the Canadian Charter of Rights and Freedoms protect the individual's rights to belong to three types of communities simultaneously: the universal community of human beings, the Canadian political communities,

3 *e.g.* Owen Fiss, "Groups and the Equal Protection Clause", 5 Phil. & Pub. Aff. 107 (1976); references by Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassifcation Values in Constitutional Struggles over *Brown*", 117 Harv. L. Rev. 1470 (2003–2004); and Beverley Baines, "Equality, Comparison, Discrimination, Status" in *Making Equality Rights Read: Securing Substantive Equality Rights Under the Charter* (ed. Fay Faraday et.al., 2009).

4 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

and individual identity communities."[5] In my visit to the Smithsonian Museum of American History in Washington, D.C., I observed an acknowledgement of "a right to belong."[6] Karst has linked, since 1991, the idea of equal citizenship to the idea of belonging in a community.[7] But neither American nor Canadian lawyers have developed a comprehensive legal theory about the *Right to Democratic Belonging*.

The question of *Equal Belonging in a Democratic Society* is not only about naturalized new citizens, African-Americans, Turkish Cypriots, Muslim Greeks, Maori in New Zealand, other Natives in North America, and other racial, ethnic origin minorities. The idea also extends to women, persons with disabilities, gays, lesbians, and other visible minorities who are perhaps more vulnerable to experiences of unequal belonging. The concepts apply to religious or secular people in certain contexts. And more important, the question of *Equal Belonging in a Democratic Society* is about anyone who finds her or himself in a vulnerable position or experiencing the vulnerability of unequal belonging in their specific situation. The concept applies to anyone whose equal belonging in the larger society may be threatened in a certain context. It is about all the situations that a person does not have the power and the courage to speak up about, not because of the moral content of her/his idea, but because of the structural and institutionalized powerlessness she/he may have. In practice, some of these minority groups will need to bear a heavier burden of proof for their unequal belonging in a democratic society. Even if they prove unequal belonging within a group, it does not mean that they prove unequal belonging in a democratic society. This is because some of these people are in reality more vulnerable to experiences of unequal belonging in non-democratic society, while some other people are not as vulnerable to such experiences. Therefore, the work and the burden of proof of the alleged unequal belonging of these people in a democratic society are heavier.

It is likely that the question of *Equal Belonging in a Democratic Society* also applies with modifications and limitations to non-citizens. What about

5 Donna Greschner, "The Purpose of the Canadian Equality Rights", 6 *Rev. Const. Stud.* 291 (2001–2002).

6 One could see the following text at the National Museum of African American Heritage and Culture:

> Colonization: A Place for Freedom?
>
> By upholding slavery and racism, the United States challenged African Americans' right to belong in a nation they helped build. Some moved to Canada and the Caribbean. Others escaped deep into woods and swamps. Many claimed their right to stay and continued the fight for equality. Some whites and blacks felt that they could never live together and supported the colonization movement. The issue of staying or leaving the country shed light on the meaning of black nationalism, identity, and freedom." National Museum of African American Culture and Heritage, seen in Oct, 2016. In the above text, one can observe the connection of freedom, equality, identity and belonging.

7 Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (1991).

refugees, asylum seekers, non-naturalized immigrants and tourists? What about European citizens or citizens of the European Union? Perhaps, their belonging in a democratic society will be determined and is determined by conventions and agreements. However, it is certain that all these people belong as equals in the universal human family. The very minimum content of their rights are those which come from their membership of this universal community of equals. These minimum rights mentioned also by the Preamble of the Universal Declaration of Human Rights cannot be violated in democratic societies. But non-citizens may have more rights beyond the declaration. While non-citizens do not belong in a community of equal citizens (*e.g.*, they may not have an equal right to vote in a certain democratic society without having their right to equal belonging being violated), the *Right to Equal Belonging in a Democratic Society* is still a relevant framework.

The role of the judge in a democratic society is to intervene to correct the policymakers when their acts further unequal belonging. If the policymakers further unequal belonging, they violate their constitutional duty to construct constitutional democracies, where every member has *an equally secure, "free-identity" and minimum comfortable belonging*. The idea that the judges and policymakers who once approved slavery and segregation in the name of equal protection under the laws, are called now to approve, perhaps, a radical interpretation and renegotiation of "the right to equal protection of the laws," that is *the Right to Democratic Belonging*, may lead some to say that the law is totally illusory. These judges and policymakers may say that law is simply what we wish to understand each time. But slavery was never Law. Segregation was never Law. It was only the law of the most powerful, which took arbitrarily the form of positive law. I would say that our moral evolution is depicted in how we admit what is really meant by the Law.[8] But do we finally deal with a moral issue? To understand and apply "the right to equal protection of the laws" as *the Right to Democratic Belonging* is indeed a basic moral issue of understanding equality in terms of belonging. Such potential moral conscience can lead to a legal positive and affirmative recognition.

This manuscript has been my effort to offer a new interpretation of the well-known right to equal protection of the laws. The purpose of the book has been to present the general theory of the right: the *Theory of the Right to Democratic Belonging*. The real motivation of sculpting the general theory has been to respond to weaknesses of existing approaches of the judicial review and policies over the right to equal protection of the laws.

I have again in my mind the 3-year-old girl that I spoke of earlier. I am thinking that if she does not learn through her childhood and teenage years what belonging in a group means, she may not appreciate her public relationships and belonging in a society as an adult. The extent that she will learn to

8 This reminds us of what Olivier Wendell Holmes said in 1897: "[t]he law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."

live in relationships as a child and teenager may have an impact on how she will see her public relationships as an adult. She will need to see that what is to be equal in a group of people is that you belong as equal in this group. She will need to understand equality in practice because a democratic society is simply a group of people. Learning how to develop true relationships in the personal and social life may have impact on the relationships in public and political life. Imagine this girl throwing a small stone in a lake. She may notice concentric circles in the water.

Executive Summary of the General Theory

Constitutional and human rights lawyers and scholars in national, European or international discourse all contemplate the right to equal treatment under the law and equal protection of laws; even though they may use slightly different terminology. They may talk about the right to equal protection of the laws, equality before and under the law, or/and equal benefit of the law. We however may interpret this right differently. I suggest that we need to understand the right to equal protection of the laws in terms of belonging. In particular, I find that we need to interpret the right as the *Right to Equal Belonging in a Democratic Society* or, in other words, the *Right to Democratic Belonging*.

I first define the democratic society as the general context where the right is defined and limited. I have defined the democratic society as "a participatory community of equals." Upon this premise, I develop the theory of the *scope of the Right to Democratic Belonging* as the right to equal belonging. The democratic element is inherent in the definition of the right but implicitly. I then identify three inherent rights. First, it is the *right to secure belonging in a community of equals*. Then, it is *the right to* "free-identity" belonging *in a community of equals*. Third, it is *the right to minimum comfortable belonging in a community of equals*. The latter is a by-product right of the two other inherent rights. These three rights are linked but also, at least the two first ones, can be violated independently of each other.

I also analyze when the grounds of distinction contribute in the analysis of the right, finding that the grounds of distinction should be understood in a contextual, purposive and substantive way. In particular, I suggest that the relevant grounds of distinction are those which constitute *grounds of unequal belonging*. The grounds of distinction which add suspicions for violation of the *right to equal belonging* are the *grounds of unequal belonging*.

I consider the analysis of the scope of the right as the first main analytical pillar of the right. The second analytical pillar of the theory concerns the question of whether the limits or restrictions of the right constitute reasonable limits in a democratic society. In other words, the question of the next analytical pillar is whether the prima facie violation of the right is justified in a democratic society. I do not offer a model of analysis of this second pillar. I have however identified a criterion common to these two main analytical

pillars: the scope of the right as well as the justification of the limits of the right. This common element is *the minimum content of the Right to Democratic Belonging, which is the right to self development, self rule, self identification and the right to non-dominance*. The *minimum content* is the implicit starting point of the analysis of the scope of the right. The scope of the right is built on the minimum content of the right. The *minimum content of the Right to Democratic Belonging* is also a crucial element in the analysis of the second pillar over the justification of the limits of the rights. The democratic element becomes more explicit in this second pillar. If there is a violation of *the minimum content of the right*, the violation of the right is certainly established. In no democratic society can the violation of the *minimum content of the Right to Democratic Belonging* be considered anything else but violation of this right. In this case, there is no need for further analysis. Only above this threshold of protection, can the judges and the policymakers discuss any principle of proportionality and/or other considerations over the justification of the limits of the right in a democratic society. I do not clarify the various analytical steps of any proportionality test, but I emphasize that, for the right to be protected, any reasoning over proportionality can only take place above the threshold of protection the minimum content of the right sets. The theory of the Right to Democratic Belonging is based on a contextual, substantive and purposive analysis of the involved relationships as they stand before and after the enactment of a certain policy.

Glossary of basic terminology of the general Theory of the Right to Democratic Belonging

Belonging membership in a relationship

Good of reference the provided benefit, understood in a purposive and a contextual way

Two primary relationships (i) the relationship of the Claimant to the *good of reference* ("the relationship C[laimant] to B[enefit]/*Good of Reference*"), and (ii) the relationship of the Designated Beneficiaries to the same *good of reference* ("the relationship D[esignated] B[eneficiary] to B[enefit]/*good of reference*"), as they stand before the enactment of the impugned policy/legislation, which provides an immediate benefit, **(*the two pre-existing primary relationships*)** as well as, after its enactment (***post enactment primary relationships***)

Community of equals community of people of equal worth in their membership

Democratic society a participatory community of equals

The Right to Democratic Belonging *the Right to Equal Belonging in a Democratic Society*. This is the ultimate right.

The right to equal belonging or ***the right to belong in a community of equals*** *the right to secure, "free-identity" and minimum comfortable belonging in a community of equals* or *the right to equally secure, "free-identity" and minimum comfortable belonging in a certain relationship*. This is an inherent right in *the Right to Democratic Belonging*.

Disadvantage It is considered to be the lack of genuine opportunities for secure, "free-identity" and comfortable functionings. Wolff and de-Shalit's analysis of the same term[1] considers it to be "the lack of genuine opportunities for secure functionings."

The right to secure/safe belonging in a community of equals the right to be free from prejudice, stereotype, perpetuation and/or worsening of pre-existing disadvantage and any other form of oppression and dominance, which demeans the secure belonging in a community of equals. It is the first suggested inherent right in *the right to equal belonging*. Its violation

1 Jonathan Wolff and Avner de-Shalit, *Disadvantage* (2007).

constitutes a violation of *the right to equal belonging* and *a prima facie violation of the Right to Democratic Belonging.*

The right to* "free-identity" belonging *in a community of equals the right to belong in a community of equals being free in your identity and true to yourself. In particular, the following contextual factors can be relevant to the definition of the right (i) to be immersed and integrated in the larger society; (ii) to be distinct and integrated in the larger society; (iii) to be excepted from general rules and regulations, under certain circumstances, and (iv) to enjoy the right to self-government, under certain circumstances. *The right to* "free-identity" belonging is the second criterion and inherent right in *the right to equal belonging.* Its violation constitutes *a violation of the right to equal belonging* and *a prima facie violation of the Right to Democratic Belonging.*

Five types of identity group differentiated rights and/or claims (i) promoting immersion and integration; (ii) amelioration of a disadvantage rooted in history and promoting integration, peace and reconciliation; (iii) preventing assimilation, while promoting integration; (iv) claims or rights of exclusion of the laws and regulations, but not in the form of self-government rights, and (v) self-government rights.

I identify four general analytical criteria of judicial review which can be described in the form of four questions (i) [how much] does the identity group differentiated claim or right express the personal uniqueness and autonomy of the beneficiaries? (ii) [how much] does the identity group differentiated claim or right represent the real interests of the beneficiaries? (iii) [how much] is the identity group differentiated claim or right remedial? (iv) [how much] does the identity group differentiated claim or right respect the minimum internal liberalism?

The term identity group differentiated rights reminds us of Kymlicka's term of "group differentiated rights." The three types of group differentiated rights, he distinguishes, are the following: (1) self-government rights; (2) polyethnic rights; and (3) special representation rights. He does not however see them as the only possible forms of such rights.

Minimum internal liberalism This is a minimum limit to the group rights. No group right can exist in the universe of justice if it does not respect the minimum internal liberalism. This is another name for the individual autonomy and freedom of the members of the group within the group. I have designed this term drawing *a contrario* on the term "internal restrictions" in Kymlicka's liberal theory of minority rights. These are restrictions the groups may impose on their members. Kymlicka's liberal theory looks at them with skepticism calling for "freedom within the group."

***The right to minimum comfortable belonging in a community of* equals** a by-product of "*the rights to secure/safe and* "free identity" belonging *in a community of equals.*" It is mainly explained as the lack of anxiety in the belonging in a community of equals, because of a secure/safe and/or "free-identity" belonging. *The right to minimum comfortable belonging in*

a community of equals is the third criterion and inherent right in *the right to equal belonging*. Its violation constitutes a violation of *the right to equal belonging and a prima facie violation of the Right to Democratic Belonging*.

Grounds of unequal belonging the relevant grounds of distinction, which trigger suspicions for the violation of *the right to equal belonging*. These are grounds of distinction, which are indications for experiences of unequal belonging. In other words, these are grounds which trigger suspicions for violation of at least of one of the three inherent rights in *the right to equal belonging*, explained in Chapters 3–5. These are grounds which indicate experiences of vulnerability for unequal belonging in the particular context. It is not the race or gender or disability themselves. It is the experiences of unequal belonging people may have because of their race, gender, disability *etc*. For the ground of distinction to be a ground of unequal belonging, it needs to be proved in a certain context.

Minimum content of the Right to Equal Belonging in a Democratic Society the right to rule yourself, the right to improve a disadvantage which threatens your freedom to self rule, self development and self identification. It can be understood in negative terms as *the right to non-dominance* at a social and/or economic and/or identity and/or emotional level. A contextual factor which indicates the violation of the *minimum content of the Right to Equal Belonging in a Democratic Society* is "a perpetuation and/or worsening of a pre-existing disadvantage or whatever other disadvantage threatens your power to self rule, self development and self identification." The general idea of *the minimum content of the right* resembles the idea of the core of the rights. What the contribution of the identification of the minimum content of the *Right to Equal Belonging in a Democratic Society* is a contribution to the theory of the specific *Right to Equal Belonging in a Democratic Society*. It contributes as the core of the scope of the right. It also contributes as the minimum threshold of protection any limits of the right should respect in a democratic society. If the limits of the right do not respect this threshold of protection, then the right is violated.

Representativeness the relationship of the representative and represented understood in terms of ***substantive political proximity***. I have understood this relationship as a *Power of Attorney*. The parties of this *Power of Attorney* are the following: (a) represented/trustor/beneficiary and (b) representative/trustee. The substantive political proximity has been explained with two more specific ideas: (a) in terms of the substantive political accessibility and (b) in terms of expertise on the particular issue of the legislation. A *continuum of political relationships* has been provided to illustrate the distinction the institutionalized *political disadvantage* from the *ideological or moral political disadvantage*.

Inter- and Intra-group Complaints of Unequal Belonging There are ***two types of inter-group claims of unequal belonging*** (a) Inter-group Annulment Challenges of Unequal Belonging and (b) Inter-Group Under-inclusiveness

Complaint of Unequal Belonging. There are ***two types of intra-group complaints of unequal belonging*** (a) *Intra-Group Under-inclusiveness Membership Complaint of Belonging*, and (b) *Intra-group Unequal Belonging Complaint*. To put it in a positive way, these complaints indicate *the Claims to Inter- and Intra-Group Equal Belonging.*

Claimant and/or the Potential Beneficiary For the purposes of this book when I use the terms Claimant and the Potential Beneficiary together I meant to show the [potential] claims both before the judiciary and the policymakers. In particular, Claimant is an individual or a group of individuals who initiate litigation challenging the impugned legislation. Potential Beneficiary or Claimant during the policy making is an individual or a group of individuals whose interests allegedly may be affected with the policy under consideration and the policymaker should consider their claim.

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